

**Commonwealth of Massachusetts  
Supreme Judicial Court**

No. DAR - \_\_\_\_\_

**Appeals Court**

Appeals Court No.: 2023-P-0226

ARACELI ARGUELLO and LUCAS VICUNA, as Parents and Next Friends  
of their minor children, JUAN ERNESTO VICUNA REYES, and JOSHUA  
DANIEL VICUNA,

Plaintiffs / Appellants

v.

DRAPER PROPERTIES, INC.,

Defendants / Appellee

On Appeal from Judgment of the Trial Court  
Department of the Norfolk Superior Court

**JOINT APPLICATION FOR DIRECT APPELLATE  
REVIEW BY THE SUPREME JUDICIAL COURT**

Counsel for Appellee  
Mark W. Shaughnessy, BBO# 567839  
[mshaughnessy@boyleshaughnessy.com](mailto:mshaughnessy@boyleshaughnessy.com)  
Matthew H. Greene, BBO# 673947  
[mgreene@boyleshaughnessy.com](mailto:mgreene@boyleshaughnessy.com)  
Timothy J. Wadman, BBO# 696630  
[twadman@boyleshaughnessy.com](mailto:twadman@boyleshaughnessy.com)  
Boyle|Shaughnessy Law PC  
695 Atlantic Avenue, 11<sup>th</sup> Floor  
Boston, MA 02111  
Phone: (617) 451-2000  
Fax: (617) 451-5775

Counsel for Appellants  
Owen R. O'Neill, BBO# 552519  
[owen@oolawgroup.com](mailto:owen@oolawgroup.com)  
Ryan E. Toombs, BBO# 679272  
[ryan@oolawgroup.com](mailto:ryan@oolawgroup.com)  
Owen O'Neill Law Group, LLC  
600 Chapman Street, Suite 4  
Canton, MA 02021  
Phone: (339) 502-8900

**I. REQUEST FOR DIRECT APPELLATE REVIEW**

Defendant/Appellee, Draper Properties, Inc., ("Draper" or "Defendant"), jointly with Plaintiffs/Appellants, Araceli Arguello and Lucas Vicuna, as Parents and Next Friends of their minor children, Juan Ernesto Vicuna Reyes, and Joshua Daniel Vicuna (collectively, "Plaintiffs"), pursuant to Mass. R. App. P. 11(b), hereby request direct appellate review by the Supreme Judicial Court ("SJC") of the narrow issue set forth herein.

The question presented is appropriate for direct appellate review as it is a matter of first impression wherein the public interest is paramount. See, Mass. R. App. P. 11.

The precise question of law that is presented by this appeal is whether the Trial Court properly dismissed Plaintiffs' Complaint on the grounds that Mass. R. Civ. P. 19 ("Rule 19") prohibits minor consortium plaintiffs from choosing to await the outcome of the underlying negligence case and then filing a separate, subsequent action against the same defendant for loss of consortium.

A copy of the Trial Court's order on appeal ("Order") is appended hereto as Exhibit 1. A copy of the Docket entries for the underlying Negligence Action ("Underlying Action") has been appended to this application as Exhibit 2 (Lucas Vicuna Trial Docket) and Exhibit 3 (Lucas Vicuna Appeals Docket). A copy of the Docket entries for the Loss of Consortium Action

("Consortium Action") has been appended to this application as Exhibit 4 (Arguello/Vicuna Docket).

In the instant matter, the issue of state law relevant to this appeal should be heard by this Court because: (1) there is a strong public interest in determining whether minor plaintiffs may choose to await the outcome of the negligence case to file a separate lawsuit to pursue their loss of consortium rights; (2) these are novel questions of first impression; and (3) this Court's final determination will serve the judicial economy and avoid potentially inconsistent lower court decisions in similar pending cases.

## **II. STATEMENT OF PRIOR PROCEEDINGS**

On August 29, 2016, Appellant Lucas Vicuna filed the underlying action against Defendant in Norfolk County Superior Court. The action was set for trial on November 12, 2019. On October 22, 2019, Plaintiffs' counsel sent a letter to Defendant's counsel notifying them of their intent to pursue claims for loss of parental consortium on behalf of Vicuna's two minor sons. See Exhibit 5, Defendant's Motion in Limine to Preclude Loss of Consortium Claims of Plaintiff's Minor Children, or in the Alternative, to Require Compulsory Joinder of Claims. Defendant filed a motion *in limine* to preclude the loss of consortium claims of Vicuna's children, or in the alternative, to require compulsory joinder of the claims,

pursuant to Rule 19. See *id.* At the November 7, 2019 Final Trial Conference, the Court noted that Plaintiff “should have done it all in the first thing,” but denied the motion without further elaboration. See Exhibit 6, Transcript of Final Trial Conference, at pp. 14-19.

The action was tried to a jury from November 12 to November 21, 2019. See Ex. 2. The jury rendered a verdict on November 26, 2019. *Id.* The jury found that Defendant was negligent based on its duty as a property owner, finding both negligence and causation. See Exhibit 7, Special Questions Jury Verdict. The jury also found that Plaintiff Lucas Vicuna was comparatively negligent and determined that he was 70 percent responsible for the accident, thereby barring any recovery. See *id.* Final judgment entered in favor of Defendant on December 24, 2019. See Exhibit 8, Vicuna Judgment.

Both parties pursued cross-appeals, and the Appeals Court affirmed the judgment in favor of Defendant on July 2, 2021. See Exhibit 9, Memorandum and Order, dated July 2, 2021. On August 2, 2021, the Superior Court entered judgment after rescript in favor of Defendant. See Exhibit 10, Judgment After Rescript.

On August 17, 2021, Plaintiffs filed the consortium action against Defendant in Norfolk County Superior Court. See Ex. 4. Defendant filed a Motion to Dismiss on December 16, 2021, which Plaintiffs opposed on January 26, 2022. See Ex. 4. Following



oral argument on these motions on July 20, 2022, the Trial Court allowed Defendant's Motion to Dismiss on September 2, 2022. See Ex. 1. In its order, the Trial Court found that there were "appealing circumstances" which warranted dismissing Plaintiffs' loss of consortium claims which were not joined in the underlying negligence case. See *id.*, at p. 10.

On September 12, 2022, Plaintiffs timely filed their Notice of Appeal.

### **III. SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL**

#### **A. The February 18, 2015 Incident**

On February 18, 2015, Plaintiff Vicuna was working as an employee of MV Construction, Inc. at Defendant's property located at 28 Draper Lane, Canton, Massachusetts. See generally, Exhibit 11, Loss of Consortium Complaint. He was removing snow from the roof at the premises when he fell to the ground below and sustained serious injuries to his head and left arm. See *id.* at ¶ 5.

#### **B. Consortium Claims Asserted by Minor Plaintiffs**

Plaintiff Juan Ernesto Vicuna Reyes was fifteen years old at the time the Loss of Consortium Complaint was filed. See *id.* at ¶ 3. Plaintiff Joshua Daniel Vicuna was eight years old at the time the Loss of Consortium Complaint was filed. See *id.* Plaintiff Lucas Vicuna is their father and filed the consortium

action, along with their mother, Plaintiff Araceli Arguello, as parents and next friends of the two minor children. *See id.*

Plaintiffs allege that Vicuna's injuries, which were a result of Defendant's negligence, caused physical, emotional, and behavioral side effects which have permanently impaired his parental relationship with his two sons. *See id.* at ¶ 12. This impairment, Plaintiffs allege, resulted in the children "losing much love, support, companionship, guidance, advice, and consortium of their father." *See id.* These losses have caused the two children to suffer mental stress, anxiety, and emotional trauma. *See id.* at ¶ 13.

As detailed in the preceding section, the minor Plaintiffs chose not to assert their parental consortium claims in the underlying action. Instead, they filed a subsequent action, which was dismissed on the grounds that Rule 19 barred Plaintiffs' loss of consortium claims, and issue preclusion was not available to them as the negligence finding against Defendant was not essential to the judgment in the case. *See, generally* Ex. 1.

**IV. STATEMENT OF THE ISSUE OF LAW RAISED BY APPEAL TOGETHER WITH A STATEMENT INDICATING WHETHER THE ISSUES WERE RAISED AND PROPERLY PRESERVED**

The question presented by way of this appeal represents a matter of first impression as to whether Rule 19 requires compulsory joinder a minor's of loss of consortium claims with

the claims of the injured party in an underlying negligence case.

The parties submit that direct appellate review is warranted on the issue of whether the minor consortium plaintiffs may choose to await the outcome of the negligence case and then file a separate lawsuit to pursue their loss of consortium rights.

Defendant properly raised this issue on Motion to Dismiss. See Ex. 1. The Court's decision granting Defendant's motion is the subject of this appeal.

#### **V. BRIEF ARGUMENT IN SUPPORT OF DIRECT APPELLATE REVIEW**

The Norfolk Superior Court's decision on Defendant's Motion to Dismiss determined that Mass. R. Civ. P. 19(a) barred Plaintiffs' loss of parental consortium claims, and that issue preclusion was unavailable to the minor Plaintiffs. See *generally*, Ex. 1. As detailed herein, Massachusetts courts have not addressed this issue in any prior appellate decisions. As such, the parties seek direct appellate review by this Court.

#### **A. Plaintiffs' Position**

The lower court's decision dismissing the two minor plaintiff's loss of parental consortium claims should be reversed because they are separate, independent claims of Lucas Vicuna's two minor children, who were just ages 13 and 6 as of the time that their father's negligence action was tried before a Norfolk County jury in November of 2019. Massachusetts law

did not require that those independent claims be pursued along with the father's negligence claim. Before the negligence trial started, the trial judge specifically denied the defendant's pretrial motion, which sought to join those parental loss of consortium claims or, alternatively, to bar the minor plaintiffs from ever bringing their loss of consortium claims.

Additionally, the lower court's subsequent dismissal of the Loss of Consortium Complaint brought on behalf of the two minor plaintiffs should be reversed because the motion judge failed to recognize that the trial judge in the negligence action had previously ruled that the minors' loss of consortium claims did not need to be joined and tried with their father's claim. See Exhibit 2, (Lucas Vicuna Docket) on November 11, 2019, "Endorsement on Motion in limine (#27.0): to Preclude Loss of Consortium Claims of Plaintiff's Minor Children or, in the Alternative, to Require Compulsory Joinder of Claims DENIED."

The minor plaintiffs also assert that the doctrines of collateral estoppel and issue preclusion require that the lower court allow the minor plaintiffs to pursue their loss of parental consortium claims, and that the defendant be precluded from re-litigating the issues of its negligence and the causal relationship its negligence had with respect to the father's injuries. The plaintiffs assert that the lower court erred in finding that Rule 19 bars their loss of parental consortium

claims, because those independent claims were not subject to compulsory joinder under Rule 19(a). Under Rule 19(a), a party is only subject to compulsory joinder if "(1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

The trial judge in the underlying negligence action properly denied the motion filed by the defendant before the jury trial which sought to compel the minor plaintiffs to assert their loss of parental consortium claims or, alternatively, to dismiss their claims in their entirety. No Massachusetts case law required them to do so, nor did Rule 19 require them to assert their loss of parental consortium claims, which were not fully ripe at that time. By allowing the minor plaintiffs to hold off on pursuing their claims, the trial judge in the negligence action did not subject the defendant to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations" by reason of the two minor boys' loss of consortium claims. Indeed, there is nothing *inconsistent*

with the minor plaintiffs only pursuing those claims in the event that there was a final, binding finding of negligence and causation against the defendant. That is precisely what happened here. The defendant had ample opportunity to litigate the issues of its negligence and causation to a jury for almost two weeks in November, 2019. While the defendant prevailed in the underlying negligence action because Lucas Vicuna was found to be 70% at fault, the defendant was found to be 30% at fault and the jury determined that its fault caused Mr. Vicuna's injuries. Applying the doctrines of collateral estoppel and issue preclusion, those final, non-appealable factual findings not only allow the minor plaintiffs to pursue their loss of consortium claims under well-settled Massachusetts law, but they also preclude the defendant from re-litigating the issues of negligence and causation.

This Court's previous ruling in *Diaz v. Eli Lilly & Co.*, 364 Mass. 153 (1973), supports the minor plaintiffs' position that they were entitled to pursue their claims for loss of *parental* consortium in a subsequent action. Nothing in *Diaz* is inconsistent with the minor plaintiffs bringing a loss of consortium action after a jury found that the defendant had negligently caused harm to their father. Indeed, *Diaz* does not address the issue of minor plaintiffs litigating loss of

parental claims, but is instead focused on spousal claims brought by adult plaintiffs.

The plaintiffs contend that principles of judicial economy support *their* position that they are entitled to pursue loss of parental consortium claims, but only when their parent prevails on the issues of negligence and causation in an underlying negligence action. If the minor plaintiffs were to have litigated their loss of parental consortium claims in the initial negligence trial, that trial would have taken longer and exhausted more judicial resources. Moreover, if the jury had ruled that the defendant was not negligent, or that its negligence did not cause harm to their father, then valuable judicial resources would have been wasted in litigating the loss of consortium claims of the two children. Unfortunately for the defendant, the jury did, in fact, find that it was negligent and that its negligence had caused harm to the boys' father. It is those jury findings which now give the minor plaintiffs the right to pursue their independent claims for the loss of their father's consortium.

#### **B. Defendant's Position**

The Trial Court's decision should be affirmed because the Court: (1) recognized the unique relationship between the negligence and consortium causes of action in that they are distinct, but arise from the same injury; (2) with this

relatedness in mind, correctly found that bringing consortium claims after the conclusion of the negligence case was in direct contravention of the provisions of Rule 19; (3) recognized the misconceptions in Plaintiffs' theory on the use of issue preclusion; and (4) determined that compulsory joinder under Rule 19 in the instant circumstances is in the best interests of judicial economy.

**1. The Trial Court correctly found that Rule 19 bars Plaintiffs' loss of consortium claims.**

**a. The Trial Court ruled that the Plaintiffs' claims were subject to compulsory joinder under Rule 19(a).**

As contemplated in Rule 19, joinder of parties is at times necessary for just adjudication. Under rule 19(a), a party is subject to compulsory joinder if "(1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a *substantial risk of incurring double, multiple, or otherwise inconsistent obligations* by reason of his claimed interest" (emphasis added).

The decision of the Trial Court conforms to well-understood concepts that parties with claims and interests relating to the subject of the action should be joined as a party to the action.



To hold otherwise would leave existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interests by a nonparty. Moreover, if Plaintiffs were allowed to proceed in this manner, not only would Defendant be forced to relitigate the underlying negligence suit, but the second jury could reach conclusions inconsistent with those of the first jury. Thus, Defendant argues, it is in all parties' best interests to present these claims in one lawsuit to avoid multiple, or inconsistent obligations. This risk is especially present where, as here, the jury found both negligence and causation, but ultimately found that comparative negligence barred recovery. With such a complex verdict, the risk of another jury reaching an inconsistent verdict is high. Accordingly, this Court should follow Rule 19 in finding Plaintiffs' claims were subject to compulsory joinder.<sup>1</sup>

---

<sup>1</sup> Defendant also argues that ensuring that defendants are not subject to double, multiple, or otherwise inconsistent obligations promotes judicial efficiency. See *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262, 272 (1986) (upholding *Feltch*, but also noting that this ruling could lead to incongruous results). Accordingly, these claims should have been brought in one single action, before one jury, so that they could be instructed on how to consider the various categories of damages alleged by both types of plaintiffs, in order to ensure that the jury rendered a consistent verdict in light of all the information available to them. See *Feltch v. General Rental Co.*, 383 Mass. 603, 606 (1981) *Morgan*, 22 Mass. App. Ct. at 271.

**b. The Trial Court's ruling bridges the gap between *Diaz* and Rule 19 as it is presently formulated.**

The Trial Court, in granting Appellee's Motion to Dismiss, focused much of its opinion on this Court's ruling in *Diaz v. Eli Lilly & Co.* There, this Court concluded that, as a matter of sound administration and fairness, where the claim for physical injuries has been concluded by judgment or settlement or the running of limitations... no action for loss of consortium thereafter instituted arising from the same incident will be allowed, even if that action would not be otherwise barred by limitations. 364 Mass. 153, 167 (1973). In *Diaz*, this Court noted that the ruling came before the Massachusetts Rules of Civil Procedure were finalized, but advised that their opinion "should be very clear under Rule 19." *Id.* at 162 n.29; see also *Angelini v. OMD Corp.*, 410 Mass. 653, 661 (1991) (noting that there should be consistency between statutory and case law) (internal citations omitted). Since the formal adoption of the Massachusetts Rules of Civil Procedure, however, this Court has not revisited this precise issue.<sup>2</sup> Accordingly, this Court should

---

<sup>2</sup> Other jurisdictions have adopted the interpretation of Rule 19 which Defendant seeks. See *Schreiner v. Fruit*, 519 P.2d 462, 466 (Alaska 1974) (holding that the doctrine of mandatory joinder barred subsequent actions for loss of consortium); *Campos v. Coleman*, 319 Conn. 36 (2015) (holding that loss of parental consortium claims must be joined with parent's negligence claim to avoid duplicative recovery); *Hopson v. St. Mary's Hospital*, 176 Conn. 485, 494 (1979) (holding that loss of spousal consortium claims should be joined in one action and tried

uphold the Trial Court's decision and hold that consortium claims must be brought in the same action as the underlying negligence claim, thereby bridging the gap between Massachusetts common law precedent and Rule 19.

**2. The Trial Court correctly found that offensive issue preclusion was unavailable to Plaintiffs in the loss of consortium action as the negligence finding was not essential to the judgment.**

Plaintiffs contend that there is no threat of duplicative litigation because, through the use of offensive collateral estoppel, liability has been established and the only issue remaining in the consortium action would be the consortium plaintiff's damages. However, this position is not supported by Massachusetts law.

In granting Defendant's Motion to Dismiss, the Trial Court ruled that issue preclusion was unavailable to Plaintiffs. Issue preclusion is available only if the negligence finding against Defendant in the negligence lawsuit was essential to judgment in

---

before a single trier of fact to minimize the possibility of inconsistent verdicts); *Brown v. Metzger*, 104 Ill. 2d 30, 35 (1984) (holding that mandatory joinder of direct claims and loss of consortium claims are the "most efficient way to preclude double-recovery problems"); *Thill v. Modern Erecting Co.*, 284 Minn. 508, 513 (1969) (requiring joinder of loss of consortium claims is "an indispensable safeguard against the danger of double recovery"); *Cogdell v. Hospital Center at Orange*, 116 N.J. 7, 13-26 (1989) (holding that its version of Rule 19 barred second, subsequent actions for loss of consortium pursuant to the entire discovery doctrine). Notably, no jurisdiction has expressly ruled that piecemeal litigation of loss of consortium claims is permitted.

the case. See *Rudow v. Fogel*, 376 Mass. 587, 591 (1978).

However, final judgment entered in favor of Defendant because of Plaintiff Vicuna's 70 percent comparative negligence. Thus, "the jury's finding in that case that Draper was negligent was hardly essential to the judgment; in fact, it was at odds with the judgment." See Ex. 1 at p. 8; see also *Cumbria v. Jeffery*, 307 Mass. 49 (1940) (explaining that the finding of defendant's negligence was unnecessary to the judgment, or even repugnant to it, and thus could not be given preclusive effect in the later action). As a result, Plaintiffs cannot utilize issue preclusion to establish Defendant's liability, as the finding of negligence in the underlying action was not essential to the judgment in the case. Rather, Plaintiffs would have to establish negligence all over again. See Ex. 1 at p. 8 (explaining that to relitigate the issue would subject the parties to "'double, multiple or otherwise inconsistent obligations,' in the words of rule 19(a)"). Accordingly, this Court should affirm the Trial Court's decision in holding that these claims should have been brought together. See *Corrigan v. General Electric Company*, 406 Mass. 478, 481 (1989) (noting that the basic purpose of issue preclusion is "to conserve judicial resources, to prevent the unnecessary costs associated with multiple litigation, and to ensure the finality of judgments") (internal citations omitted).

**VI. STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE**

Direct appellate review is appropriate in this case because the narrow issue involved is one of first impression in this Commonwealth and presents a novel question of law which should be submitted for final determination to the Supreme Judicial Court. In particular, the Trial Court's allowance of Defendant's Motion to Dismiss sets forth a new interpretation of Rule 19, applying compulsory joinder in the context of loss of parental consortium claims.

Moreover, the question is of sufficient public interest to the potential plaintiffs and defendants in loss of consortium actions which may be brought in the future that justice requires a final determination by this Court. In effect, the Trial Court's interpretation of Rule 19 would impact the rights of potential consortium plaintiffs by taking away a substantive cause of action. Conversely, it protects the rights of defendants who would otherwise be subject to piecemeal, successive litigation by related parties arising from the same underlying incident. This issue is one which has and will continue to recur in the lower courts of the Commonwealth, but which has not been addressed since the formal adoption of Rule 19. Ultimately, the parties request direct review by this Court to determine whether the Trial Court's decision appropriately

weighs these competing interests of litigants as well as the judicial economy.

For these reasons, the parties submit that this application for direct appellate review should be allowed.

Respectfully Submitted,

PLAINTIFFS,  
ARACELI ARGUELLO and LUCAS VICUNA,  
as Parents and Next Friends of  
their minor children, JUAN ERNESTO  
VICUNA REYES, and JOSHUA DANIEL  
VICUNA,  
BY THEIR ATTORNEYS,

DEFENDANT,  
DRAPER PROPERTIES, INC.,  
BY ITS ATTORNEYS,

/s/Owen R. O'Neill  
Owen R. O'Neill, BBO# 552519  
[owen@oolawgroup.com](mailto:owen@oolawgroup.com)  
Ryan E. Toombs, BBO# 679272  
[ryan@oolawgroup.com](mailto:ryan@oolawgroup.com)  
Owen O'Neill Law Group  
600 Chapman Street,  
Suite 4  
Canton, MA 02021  
Phone: (339) 502-8900

/s/ Mark W. Shaughnessy  
Mark W. Shaughnessy, BBO# 567839  
[mshaughnessy@boyleshaughnessy.com](mailto:mshaughnessy@boyleshaughnessy.com)  
Matthew H. Greene, BBO# 673947  
[mgreene@boyleshaughnessy.com](mailto:mgreene@boyleshaughnessy.com)  
Timothy J. Wadman, BBO# 696630  
[twadman@boyleshaughnessy.com](mailto:twadman@boyleshaughnessy.com)  
Boyle|Shaughnessy Law PC  
695 Atlantic Avenue, 11<sup>th</sup> Floor  
Boston, MA 02111  
Phone: (617) 451-2000  
Fax: (617) 451-5775

**CERTIFICATE OF SERVICE**

I, Mark W. Shaughnessy, Esq., attorney for Appellee, hereby certify that I served two (2) copies of the attached Joint Application for Direct Appellate Review via e-mail, to all parties of record this 21<sup>st</sup> day of March 2023.

/s/ Mark W. Shaughnessy  
Mark W. Shaughnessy, Esq.

**CERTIFICATE OF COMPLIANCE**

The parties hereby certify, under the penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the finding of direct appellate review application, including, but not limited to:

- a. Rule 11(b) (applications for direct appellate review);
- and
- b. Rule 20 (form and length of briefs, appendices, and other documents).

This brief was written in Courier New, 12-point font, and created in Microsoft Word. In compliance with Rules of Appellate Procedure Rule 11(b)(5), the Brief Argument section is ten (10) pages of monospaced font. The number of words in the Brief Argument Section are 1, 875, excluding footnotes and subheadings.

# Exhibit 1



**COMMONWEALTH OF MASSACHUSETTS**

**NORFOLK, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
NO. 2021-762**

**ARACELI ARGUELLO and LUCAS VICUNA,  
as Parents and Next Friends of their minor children,  
JUAN ERNESTO VICUNA REYES and JOSHUA DANIEL VICUNA,  
Plaintiffs**

**vs.**

**DRAPER PROPERTIES, INC.,  
Defendant**

**CORRECTED<sup>1</sup> MEMORANDUM OF DECISION AND ORDER ON DEFENDANT  
DRAPER PROPERTIES, INC.'S MOTION TO DISMISS PLAINTIFFS' LOSS OF  
CONSORTIUM COMPLAINT**

Plaintiffs Araceli Arguello and Lucas Vicuna — mother and father, respectively, and next friends of Juan Ernesto Vicuna Reyes and Joshua Daniel Vicuna<sup>2</sup> — have filed this loss of consortium lawsuit on behalf of their two minor sons against Defendant Draper Properties. This loss of consortium suit is premised upon injuries that Lucas suffered while removing snow from the roof of a building on Draper Properties' premises on February 18, 2015. Complaint, ¶ 5. This lawsuit is the second in a series; Lucas filed an earlier lawsuit against Draper Properties for negligence concerning this accident. That first case went to verdict before a jury, and ultimately resulted in a final judgment in Draper Properties' favor.

---

<sup>1</sup> When I issued this decision, I mistakenly designated this as a Suffolk Superior Court case. Correcting "Suffolk" to "Norfolk" is the only change in this Memorandum.

<sup>2</sup> Various persons mentioned in the Complaint share the last name Vicuna. For clarity I will identify the Vicuna children, Juan and Joshua, and their father, Lucas, by their first names only.

Draper Properties has moved to dismiss this new loss of consortium suit pursuant to Rule 12(b)(6). I heard oral argument on July 20, 2022. For the reasons set out below, I will allow the motion to dismiss.

### **Background**

The following facts appear in the Complaint or in the court's records concerning the underlying negligence case.<sup>3</sup>

On or about February 18, 2015, Lucas, as an employee of MV Construction, was removing snow from the roof of a building owned by Draper Properties. On that date, he fell from the roof to the ground, and in doing so sustained serious, permanent injuries, including brain trauma and several fractures to his left arm. On August 26, 2016, Lucas filed a negligence suit against Draper Properties, the Defendant in today's second suit as well. Trial for that negligence case was scheduled for November 12, 2019.

On October 22, 2019, after at least three years of litigation of the negligence claim and with trial about to begin, Lucas's counsel put Draper Properties' lawyer on notice, for the first time, that he might file loss of consortium claims on behalf of Lucas's children, Juan and Joshua. Because trial was imminent, Draper Properties' counsel responded by filing a motion in limine seeking, among other things, that the loss of consortium claims be compulsorily joined with the negligence suit on the grounds that it would serve judicial economy, obviating the need for a separate, duplicative lawsuit and a second trial. Transcript of Final Trial Conference,<sup>4</sup> Exhibit 4 to Draper Properties' brief in support of motion to dismiss this case ("TR.") at 1-2. Judge Miller

---

<sup>3</sup> I may take judicial notice of this Court's own records in a related case. *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002) ("we have stated that '[i]t seems reasonable to take judicial notice of facts when considering a motion to dismiss[,]'" quoting *Jackson v. Longcope*, 394 Mass. 577, 580 n.2 (1985); *Jarosz*, 436 Mass. at 530, quoting P.J. Liacos, Massachusetts Evidence, § 2.8.1, at 26 (7th ed. 1999) ("Further, a judge may take judicial notice of the court's records in a related action. . .") (citations omitted).

<sup>4</sup> I take judicial notice of this transcript of the hearing in a related case. See Note 3 above.

heard argument on this motion in limine (and 13 others, see TR. at 1-2 through 1-3) at the Final Trial Conference on November 7, 2019, five days before the long-scheduled trial date.

When Judge Miller reached this motion, she asked counsel for Lucas, “Why didn’t you bring [the loss of consortium claim] in the first place?” TR. at 1-14. Counsel responded that he intended to bring the consortium claims in a future lawsuit only “if [Lucas] prevail[ed] on the issue of negligence in this [negligence] case”. *Id.* Believing that counsel had not answered her question, Judge Miller asked again “why [he] didn’t bring it with the rest of the case.” *Id.* Counsel responded, “I quite often times don’t bring consortium claims [with the negligence claim]. . . . We made a conscious decision not to do that. . . . We made a strategic decision.” TR. at 1-14 through 1-15.

That “strategic decision,” argued counsel for Draper Properties, ran afoul of Rule 19 and *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 157 (1973). TR. at 1-17. Bringing a consortium lawsuit *after* a decision in the negligence lawsuit, counsel argued,

runs the risk of fragmentation of all legal claims . . . Try that [negligence] case, and then try to use collateral estoppel down the line to have every subsequent damages argument put before a different jury in a — in an attempt to multiply verdicts. This isn’t simply an assessment of damages hearing that will be done after the fact. This would be a new trial on the issue of causation and damages. A new 14 jurors in those seats. A new trial judge taking up time for other matters that could be tried.

TR. at 1-17 through 1-18. Counsel for Draper Properties then asked Judge Miller to order that the consortium plaintiffs had to “bring these claims now” — that is, try the consortium claims before the “jury coming in on Tuesday” — “or forever hold your peace.” TR. at 1-19. Not surprisingly, Judge Miller was unwilling to issue an order in the negligence case concerning the rights of Juan and Joshua, who were not parties to that case, to bring a later consortium lawsuit that was, at that point, only a twinkle in the eye of their counsel. See *id.*

Accordingly, the trial commenced on November 12, 2019, as planned. Counsel chose to present to the jury only Lucas's negligence claim, and not the consortium claims of his sons.

At that trial, Lucas argued two theories of negligence. Lucas asserted, under theory one, that Draper Properties was negligent based in its status as a property owner. Under theory two, Lucas asserted negligence based on the proposition that Draper Properties retained control over the snow-removal work of Lucas's employer, MV Construction. The jury rejected theory two, but found Draper Properties negligent under theory one. This did Lucas no good, however, because the jury found him to be comparatively negligent, allocating to him 70% of responsibility for the accident, thus barring recovery. Judgment was entered in Draper Properties' favor on December 24, 2019.

After appeals by both parties, the Appeals Court affirmed the decision on July 2, 2021. The Superior Court entered final judgment in favor of Draper Properties on August 2, 2021.

About two weeks later, on August 17, 2021, counsel who had represented Lucas in the negligence case filed this second lawsuit against Draper Properties on behalf of Juan and Joshua for loss of consortium. These claims are based on Lucas's "injuries and the resulting physical, emotional, and behavioral side effects," which, plaintiffs argue, "permanently impaired his parental relationship with his two minor sons . . . [which] resulted in [their] permanently losing much love, support, companionship, guidance, advise, and consortium of their father." Complaint, ¶ 12.

### **Analysis**

In evaluating a motion to dismiss under Rule 12(b)(6), a court generally is limited to considering "the allegations in the complaint." *Schaer v. Brandeis University*, 432 Mass. 474, 477 (2000). However, as noted above, the court can consider its own records in related cases,

such as the transcript of the motion in limine hearing before Judge Miller in the underlying negligence lawsuit.

The court must deem all allegations in the complaint to be true, *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), and must consider those allegations generously and in Plaintiff's favor. *Vranos v. Skinner*, 77 Mass. App. Ct. 280, 287 (2010). "While a complaint attacked by a ... motion to dismiss does not need detailed factual allegations ... a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Ultimately, these "[f]actual allegations must be enough to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 555. The court, however, does not accept "legal conclusions [in the complaint] cast in the form of factual allegations." *Schaer*, 432 Mass. at 477. Therefore, "[w]hat is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 573.

#### 1. Rule 19(a) Bars Plaintiffs' Loss of Consortium Claims

Draper Properties argues that the loss of consortium claims are barred because such claims were subject to compulsory joinder in the earlier negligence lawsuit by Mass. R. Civ. P. 19(a), and yet counsel for Lucas and his sons failed to join them — and, indeed, made a "strategic decision" to fight their joinder when Draper Properties sought it before Judge Miller.

As counsel for Juan and Joshua correctly points out, loss of consortium claims have long been deemed independent from underlying negligence claims. *Diaz v. Eli Lily & Co.*, 364 Mass. 153, 157 (1973). Because this is so, a "party is not barred from recovering from a negligent

tortfeasor for his independent [loss of consortium] injury because his spouse or parent was more at fault than the party being claimed against.” *Morgan v. Lalumiere*, 22 Mass. App. Ct. 262, 271 (1986); *Diaz*, 364 Mass. at 157. The issue raised by this case is whether the consortium plaintiffs may choose to await the outcome of the negligence case and then file a separate lawsuit to pursue their loss of consortium rights. The parties agree that this question has not yet been decided in the courts of the Commonwealth.

But that does not mean that Massachusetts appellate decisions are silent on the question. The case that provides the most relevant guidance is *Diaz*.

In *Diaz*, the Supreme Judicial Court took the “opportunity to reconsider” consortium rights in general. *Id.* at 153. It so happened that the negligence claim of the husband and the consortium claim of his wife were brought in separate lawsuits — but only because “the husband moved in his [negligence] action to add his wife as a party plaintiff but the motion was denied. Thereafter the wife instituted the present [loss of consortium] action.” *Id.* at 154 n.3. Because the plaintiffs already had unsuccessfully attempted to join the two claims, the *Diaz* court did not face the question raised by today’s case, namely whether a consortium plaintiff could *decide* not to include the consortium claim in the negligence lawsuit, and then bring it in a separate lawsuit years later. But in dicta, describing how consortium claims were usually handled, *Diaz* noted that a “defendant could ordinarily *insist* . . . that the [plaintiff’s] spouse be joined in the main negligence action so that a possible claim for loss of consortium should not be outstanding when the negligence claim was disposed of, leaving a *possibility of duplicating recoveries*.” 364 Mass. at 162 (emphasis added).

*Diaz* was decided as the Massachusetts Rules of Civil Procedure were under consideration but not yet adopted. As a result, Mass. R. Civ. P. 19(a), on which Draper

Properties now relies, was not yet in force. Anticipating that it soon would be, however, *Diaz* went on to say that a defendant's right to insist that the consortium claim be joined with the negligence claim "should be very clear under Rule 19 ('Joinder of Persons Needed for Just Adjudication') of our new Rules of Civil Procedure . . . The principal ground for requiring joinder on the defendant's motion is that the defendant would otherwise be exposed to 'a substantial risk of incurring double, multiple or otherwise inconsistent obligations...' See Rule 19(a)." *Id.* at 162 n.29 (quoting Mass. R. Civ. P. 19(a), then pending adoption). The court further stated that it "would leave open the possibility that in appealing circumstances [a] consortium claim might be *held to be lost* if not asserted by the time the negligence action is tried." *Id.* at 163 n.30 (emphasis added).

While today's case is not directly governed by *Diaz*, it does present exactly the "appealing circumstances" that the *Diaz* court apparently had in mind. Here, counsel for the consortium plaintiffs made a "strategic decision" to create the very situation feared by the *Diaz* court, facing a defendant with the necessity of litigating two separate lawsuits, and presenting a substantial risk of multiple or inconsistent results.

Rule 19(a) states, in relevant part, that a party's claim is subject to compulsory joinder if the party "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Mass. R. Civ. P. Rule 19(a). Draper Properties has already litigated the underlying negligence suit to a jury verdict and an Appeals Court decision, both in its favor. Now, in this second lawsuit, Draper Properties would be forced to relitigate the already-decided issue of Draper's negligence regarding Lucas's injuries.

Counsel for Juan and Joshua has asserted, in his opposition brief and at hearing on this motion, that relitigating the question of the negligence of Draper Properties would not be necessary. Under the doctrine of issue preclusion, he argues, this second loss of consortium lawsuit begins from the premise that Draper Properties is negligent, because the jury in the first trial so decided.

This argument, however, misapprehends how issue preclusion works. Issue preclusion would be available to Juan and Joshua only if the negligence finding against Draper Properties in the negligence lawsuit was essential to the judgment in that case. *Rudow v. Fogel*, 376 Mass. 587, 591 (1978). But that judgment went in favor of Draper, because of Lucas's 70% comparative negligence. The jury's finding in that case that Draper was negligent was hardly essential to the judgment; in fact, it was at odds with the judgment. In that regard, today's case is nearly identical to one on which *Rudow* relied. In *Cumbria v. Jeffrey*, 307 Mass. 49 (1940) — as in the underlying negligence case here — both parties were found negligent, and judgment entered for the defendant. Because of that judgment in favor of the defendant, the *Rudow* court explained, “the finding [in *Cumbria*] of defendant's negligence being unnecessary to the judgment — indeed, taken of itself, repugnant to the judgment — could not be transported to, and given preclusive effect in a later action.” *Rudow*, 376 Mass. at 591. The same is true here.

Because issue preclusion is not available to them, Juan and Joshua would have to establish Draper's negligence all over again; after all, there can be no consortium recovery if the defendant was not negligent. Having to relitigate the issue of negligence will “subject [the parties] to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations,” in the words of Rule 19(a), because the jury in this second case may well reach a result



inconsistent with the jury result in the first case on the question of negligence – or, for that matter, on the question of causation.

Moreover, Rule 19(a) is not the only relevant Rule of Civil Procedure. Mass. R. Civ. P. 1 requires that the Rules of Civil Procedure, including Rule 19(a), be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Relitigating, in this second lawsuit, issues already litigated in the first lawsuit would not be just, would not be speedy, and would not be inexpensive. Thus Rule 1 buttresses and explains the requirement of Rule 19(a) that the negligence and loss of consortium claims be joined in the same lawsuit.

There is a good reason no Massachusetts court has yet addressed the question of whether consortium plaintiffs have a right to make the “strategic decision” made here. The issue has not reached the appellate courts — or even been decided by the Superior Court in a reported decision, as far as the parties know — because plaintiffs invariably, and appropriately, join loss of consortium claims with the negligence claims from which they spring. In fact, even though counsel for Lucas told Judge Miller that he “quite often” makes the “conscious decision” to reserve consortium claims for litigation after resolution of the related negligence claims, TR. at 1-14 through 1-15, at the motion hearing before me he could not identify one case — other than this one — in which he had waited for a jury verdict in the negligence case before filing a separate loss of consortium lawsuit.

I need spend little time on two other arguments made by counsel for Juan and Joshua.

First, at the Final Trial Conference in the negligence lawsuit, Judge Miller declined Draper Properties’ invitation to rule that, if the consortium claims were not added to the case whose trial would begin in five days, they could not be brought in the future. While Judge Miller

decided to honor counsel's "strategic decision" not to try the consortium claims along with the negligence claims, she did not bless that decision. Her decision neither precluded Juan and Joshua from bringing this then-hypothetical lawsuit in the future, nor did it preclude Draper Properties from moving to dismiss that future lawsuit when it became real rather than hypothetical.

Judge Miller's decision was eminently practical. On the one hand, adding the loss of consortium claims into the negligence case scheduled to begin in five days undoubtedly would have delayed that trial, in a case already four years old, to allow for discovery as to the new claims and parties. On the other hand, prohibiting non-parties Juan and Joshua from bringing those claims in the future was hardly a decision to be made at a Final Trial Conference where 14 motions in limine, and undoubtedly other matters, needed to be decided. Even assuming that Judge Miller had the legal authority to act regarding a hypothetical lawsuit that persons not parties before her might file years later, her decision could only be read as deferring today's issue until Juan and Joshua filed that future lawsuit and Draper Properties moved to dismiss it. And that is where we are today.

Lastly, although Plaintiffs are correct in stating that M.G.L. c. 260, §§ 2A and 7 allow minors to file claims up until three years after their eighteenth birthday, Plaintiffs cite no authority to support the proposition that such claims are exempt from the rules of compulsory joinder.

### **Summary and Conclusion**

If ever there were "appealing circumstances" to warrant dismissing loss of consortium claims that were not joined in the underlying negligence case, *Diaz*, 364 Mass. at 30, they are

present here. Defendant Draper Properties, Inc.'s Motion to Dismiss Plaintiffs' Loss of Consortium Complaint is **ALLOWED**.

A handwritten signature in black ink, appearing to read "Paul Wilson", written in a cursive style.

---

Paul D. Wilson  
Justice of the Superior Court

September 2, 2022

# Exhibit 2

# 1682CV01105 Vicuna, Lucas vs. Draper Properties, Inc.

- Case Type:
- Torts
- Case Status:
- Open
- File Date
- 08/29/2016
- DCM Track:
- F - Fast Track
- Initiating Action:
- Other Negligence - Personal Injury / Property Damage
- Status Date:
- 08/29/2016
- Case Judge:
- 
- Next Event:
- 

[All Information](#)
[Party](#)
[Event](#)
[Tickler](#)
[Docket](#)
[Disposition](#)

## Docket Information

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
08/29/2016	Attorney appearance On this date Richard J Sullivan, Esq. added as Private Counsel for Plaintiff Lucas Vicuna		
08/29/2016	Attorney appearance On this date Owen Roe O'Neill, Esq. added as Private Counsel for Plaintiff Lucas Vicuna		
08/29/2016	Case assigned to: DCM Track F - Fast Track was added on 08/29/2016 (SENT TO ATTORNEY)		<a href="#">Image</a>
08/29/2016	Original civil complaint filed.	1	<a href="#">Image</a>
08/29/2016	Civil action cover sheet filed.	2	
08/29/2016	Demand for jury trial entered.		
09/07/2016	One Trial case reviewed by Clerk, case to remain in the Superior Court.		
10/06/2016	Attorney appearance On this date Mark William Shaughnessy, Esq. added for Defendant Draper Properties Inc		
10/06/2016	Attorney appearance On this date Christopher Gerard Perillo, Esq. added for Defendant Draper Properties Inc		
10/06/2016	Received from Defendant Draper Properties Inc: Answer with claim for trial by jury;	3	
10/25/2016	Summons, returned SERVED by delivering in hand to Barbara Hober, manager, person in charge at the time of service on 9/26/2016 at 8:26am (received 10/24/2016)  Applies To: Draper Properties Inc (Defendant)	4	<a href="#">Image</a>
02/14/2017	Attorney appearance On this date Matthew H. Greene, Esq. added for Defendant Draper Properties Inc		
02/14/2017	Attorney appearance On this date Christopher Gerard Perillo, Esq. dismissed/withdrawn for Defendant Draper Properties Inc		
03/27/2017	Defendant(s) Draper Properties Inc motion filed to compel production of employment records from MV Constructions, Inc.	5	
03/27/2017	Draper Properties Inc's Memorandum in support of motion to compel production of employment records from MV Construction, Inc.	5.1	
03/27/2017	Affidavit of Matthew H Greene	5.2	
03/27/2017	Affidavit of compliance with Superior Court Rule 9A	5.3	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Applies To: Greene, Esq., Matthew H. (Attorney) on behalf of Draper Properties Inc (Defendant)		
03/27/2017	Rule 9A notice of filing	5.4	
03/27/2017	Rule 9A list of documents filed.	5.5	
04/04/2017	Endorsement on motion to compel records (#5.0): Employment Records from MV Construction, Inc. ALLOWED See Order.		
04/04/2017	ORDER: for Production of Employment Records pertaining to Lucas Vicuna from MV Construction, Inc. Certified copies mailed 4/4/2017.	6	<a href="#">Image</a>
07/27/2017	Plaintiff, Defendant Lucas Vicuna, Draper Properties Inc's Joint Motion to Amend the Tracking Order Deadlines (filed via email)	7	<a href="#">Image</a>
07/31/2017	Endorsement on Motion to extend tracking deadline(s) (#7.0): ALLOWED Motion allowed as assented to in that Discovery is extended to 11/30/2017; R56 Service deadline is extended to 01/05/2018; R56 filing deadline is extended to 01/02/2018; Case is scheduled for a final pre-trial conference on 3/15/2018 at 2:00 p.m. See Order of even date. Dated 7/28/2017. Notices mailed 7/31/2017.		<a href="#">Image</a>
07/31/2017	ORDER: Order Regarding Parties' Joint Motion to Amend Tracking Order Deadlines. Copies mailed 7/31/2017.	8	<a href="#">Image</a>
08/03/2017	The following form was generated:  Notice to Appear for Final Pre-Trial Conference on Thursday, March 15, 2018 at 2:00 P.M. in Courtroom 10 Sent On: 08/03/2017 09:39:14	9	
10/06/2017	Draper Properties Inc's MOTION for appointment of Other - of Out-Of-State Commissions (Rec'd. 10/5/2017)	10	
10/06/2017	Affidavit of compliance with Superior Court Rule 9A (Rec'd. 10/5/2017)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	10.1	<a href="#">Image</a>
10/06/2017	Rule 9A notice of filing  (Rec'd. 10/5/2017)	10.2	
10/06/2017	Rule 9A list of documents filed.  (Rec'd. 10/5/2017)	10.3	
10/10/2017	Endorsement on motion for (#10.0): Defendant Draper Properties Motion for Appointment of out-of-state commission ALLOWED (dated 10/10/17) notice sent dl  Judge: Davis, Hon. Brian A		<a href="#">Image</a>
10/10/2017	ORDER: Court Order (dated 10/10/17) copy sent dl  Judge: Davis, Hon. Brian A	11	<a href="#">Image</a>
11/17/2017	Defendant Draper Properties Inc's Assented to Motion to extend tracking deadline(s) Discovery	12	
11/20/2017	Event Result: Judge: Davis, Hon. Brian A The following event: Final Pre-Trial Conference scheduled for 03/15/2018 02:00 PM has been resulted as follows: Result: Not Held Reason: Joint request of parties		
11/20/2017	Endorsement on Motion to extend tracking deadline(s) (#12.0): ALLOWED Discovery deadline is extended up to and including February 28, 2018; plaintiff's expert designation deadline is March 30, 2018; Defendant's expert designation deadline is May 31, 2018; Rule 56 service deadline is June 15, 2018; Rule 56 filing deadline is July 13, 2018. Pre-trial conference is scheduled for August 28, 2018 at 2:00 p.m. (dated 11/20/17) notice sent dl  Judge: Davis, Hon. Brian A		<a href="#">Image</a>
11/20/2017	ORDER: and Decision Regarding Defendant's Assented to Motion for Extension of Tracking Order Deadlines (Docket No. 12.90) (dated 11/20/17) copy sent dl  Judge: Davis, Hon. Brian A	13	<a href="#">Image</a>
03/16/2018	Defendant Draper Properties Inc's Motion for Protective Order Regarding Plaintiff's Proposed Roof Inspection (Memorandum of Law Incorporated within)	14	<a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/16/2018	Opposition to (P. 14.0) Defendant's Motion for a Protective Order regarding the Plaintiff's Proposed Roof Inspection--OPPOSITION filed by Lucas Vicuna	14.1	<a href="#">Image</a>
03/16/2018	Affidavit of compliance with Superior Court Rule 9A Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	14.2	<a href="#">Image</a>
03/16/2018	Request for hearing filed Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	14.3	
03/16/2018	Certificate of service of attorney or Pro Se: Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	14.4	<a href="#">Image</a>
03/16/2018	Rule 9A list of documents filed. Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	14.5	
03/29/2018	Endorsement on motion for protective order (#14.0): After review, motion is ALLOWED The obstacles and or condition of the roof in 2018 is not relevant to the conditions that existed in 2015. Moreover, experts routinely rely on the memories and testimony of witnesses. The inspection request is also overly broad and burdensome and potentially unsafe. (dated 3/20/18) notice sent dl Judge: Squires-Lee, Hon. Debra A		<a href="#">Image</a>
06/06/2018	Defendant(s) Draper Properties Inc motion filed to strike Plaintiff's Proposed Expert Report of Daniel M. Paine (Memorandum of Law Incorporated)	15	
06/06/2018	Opposition to P#15.0 Defendant's Motion to Strike Plaintiff's Proposed Expert Report of Daniel M. Paine ---- - OPPOSITION filed by Lucas Vicuna	15.1	<a href="#">Image</a>
06/06/2018	Request for hearing filed by Plaintiff, Lucas Vicuna on Defendant's Motion to Strike Proposed Expert Report of Daniel M. Paine Applies To: Vicuna, Lucas (Plaintiff)	15.2	
06/06/2018	Request for hearing filed Applies To: Draper Properties Inc (Defendant)	15.3	
06/06/2018	Affidavit of compliance with Superior Court Rule 9C Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	15.4	<a href="#">Image</a>
06/06/2018	Affidavit of compliance with Superior Court Rule 9A Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	15.5	<a href="#">Image</a>
06/06/2018	Rule 9A notice of filing Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	15.6	
06/06/2018	Rule 9A list of documents filed. Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	15.7	
06/07/2018	Endorsement on Motion to strike (#15.0): No Action Taken at this time. Refer to trial justice. (dated 6/7/18) notice sent dl Judge: Miller, Hon. Rosalind H		
07/25/2018	Plaintiff, Defendant Lucas Vicuna, Draper Properties Inc's Joint Motion for extension of time to file summary judgment (fax)	16	
07/27/2018	Endorsement on Motion to extend time for filing summary judgment (#16.0): ALLOWED Conference to remain on. (dated 7/26/18) notice sent dl Judge: Gildea, Hon. Mark		<a href="#">Image</a>
07/27/2018	General correspondence regarding Original of p#16 Plaintiff, Defendant Lucas Vicuna, Draper Properties Inc's Joint Motion for extension of time to file summary judgment	17	
08/01/2018	Defendant Draper Properties Inc's Motion for summary judgment, MRCP 56	18	<a href="#">Image</a>
08/01/2018	Draper Properties Inc's Memorandum in support of its motion for summary judgment (rec'd 7/31/18)	18.1	<a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/01/2018	Statement of Undisputed Facts (rec'd 7/31/18)	18.2	
08/01/2018	Joint appendix for Summary Judgment motion package filed. (rec'd 7/31/18)	18.3	
08/01/2018	Opposition to p#18 Motion for Summary Judgment - opposition filed by filed by Lucas Vicuna (rec'd 7/31/18)	18.4	<a href="#">Image</a>
08/01/2018	Defendant Draper Properties Inc's Reply to memorandum of law in support of its motion for summary judgment (rec'd 7/31/18)	18.5	<a href="#">Image</a>
08/01/2018	Affidavit of compliance with Superior Court Rule 9A  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc (Defendant)	18.6	
08/01/2018	Request for hearing filed (rec'd 7/31/18)  Applies To: Draper Properties Inc (Defendant)	18.7	
08/01/2018	Request for hearing filed (rec'd 7/31/18)  Applies To: Vicuna, Lucas (Plaintiff)	18.8	
08/01/2018	Rule 9A notice of filing (rec'd 7/31/18)	18.9	
08/01/2018	Rule 9A list of documents filed. (rec'd 7/31/18)	19	
08/03/2018	The following form was generated:  Notice to Appear before Judge Gildea on 9/5/18 at 2PM for ph#18.0 Defendants Motion for Summary Judgment p#18.1 Memorandum in support p#18.4 Plaintiffs Opposition p#18.5 Defendants Reply Sent On: 08/03/2018 10:53:26	20	
08/08/2018	Event Result:: Final Pre-Trial Conference scheduled on: 08/28/2018 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Mark Gildea, Presiding Appeared: Staff:		
08/09/2018	Pre-Trial ORDER:  The Court ORDERS:  For Good Cause, the Pretrial Conference is Continued to November 27, 2018 at 2:00PM (Gildea, J.) (Dated 8/8/2018) ns-cm  Judge: Gildea, Hon. Mark  Judge: Gildea, Hon. Mark  Judge: Gildea, Hon. Mark	21	<a href="#">Image</a>
09/05/2018	Matter taken under advisement: Rule 56 Hearing scheduled on: 09/05/2018 02:00 PM Has been: Held - Under advisement Comments: FTR Room 10 - 2:35:00 Hon. Mark Gildea, Presiding Appeared: Staff:		
09/12/2018	Endorsement on Motion for summary judgment, MRCP 56 (#18.0): DENIED When reviewing a motion for summary judgment, the court must determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120		<a href="#">Image</a>



<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
	<p>(1991). "Ordinarily, summary judgment is not an appropriate means to resolve claims of negligence because the question is usually one of fact." Petrell v. Shaw, 453 Mass.377, 406 (2009). Upon review of the summary judgment material, the court concludes that summary judgment is inappropriate in this case given that factual issues remain, including factual issues as to the extent to which the defendant may have exerted control over the means and methods of work, and as to issues related to whether the condition was, as the defendant maintains, open and obvious. As difficult as it may be to contemplate a duty of the defendant to warn the plaintiff in the circumstances of this case, the court must view the evidence in the light most favorable to the nonmoving party. " It is disputed whether Draper ever warned the plaintiff about the snow drifts that overhung the edges of certain areas of the roof, including the roof edge where the plaintiff fell. See 9A(B)(5) Statement ¶ 97. The defendant acknowledges that "to the extent that Draper owed any duty to plaintiff after he was hired to remove snow from the roof, that duty was limited to warn of dangers of which it was aware or reasonably should be aware." Although the defendant maintains that any alleged hazardous condition was open and obvious and therefore no duty to warn was owed, there may be cases in which a landowner can and reasonably should anticipate that the dangerous condition may cause physical harm to a person lawfully on their premises, notwithstanding its known or obvious danger. In such cases a landowner is not relieved of the duty of reasonable care to take further action simply because the danger was open and obvious. This duty may require the defendant to warn a person about the danger, and/or take other steps to protect him/her against the known or obvious condition or activity. The motion is denied. (dated 9/11/18) notice sent dl</p> <p>Judge: Gildea, Hon. Mark</p>		
11/27/2018	<p>Event Result:: Final Pre-Trial Conference scheduled on: 11/27/2018 02:00 PM Has been: Held as Scheduled Comments: FTR room 10 - 2:12:18 Hon. Maynard Kirpalani, Presiding Appeared: Staff:</p>		
11/28/2018	<p>Joint Pre-Trial Memorandum filed: (rec'd 11/27/18)</p>	22	<a href="#">Image</a>
11/28/2018	<p>Pre-Trial ORDER:  After a pretrial conference on November 27, 2018 the Court ORDERS: Trial with jury is scheduled for August 19, 2019 at 9:00am as FCO; For good cause, Final Trial Conference is continued to August 6, 2019 at 3:00pm; Motions in Limine to be filed on or before August 2, 2019 pursuant to Rule 9A review (Kirpalani, J)(dated; 11/27/18) ns pl  Judge: Kirpalani, Hon. Maynard</p>	23	<a href="#">Image</a>
12/04/2018	<p>Attorney appearance On this date Michael C Barker, Esq. added for Defendant Draper Properties Inc</p>		
01/14/2019	<p>Defendant Draper Properties Inc's Joint Motion in limine to continue / reschedule an event 08/19/2019 09:00 AM Jury Trial</p>	24	
01/15/2019	<p>Event Result:: Final Trial Conference scheduled on: 08/06/2019 03:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Elaine M Buckley, Presiding Appeared: Staff:</p>		
01/15/2019	<p>Event Result:: Jury Trial scheduled on: 08/19/2019 09:00 AM Has been: Rescheduled For the following reason: Joint request of parties Hon. Elaine M Buckley, Presiding Appeared: Staff:</p>		
01/16/2019	<p>Endorsement on Motion to continue / reschedule an event Motion to continue trial (#24.0): ALLOWED as assented to. Motions in Limine to be served pursuant to Rule 9A and filed by 10/31/19; final trial conference is scheduled for 11/7/19 at 2:00 p.m. Trial is scheduled for 11/12/19 at 9 a.m. First Case Out. (dated 1/15/19) notice sent dl  Judge: Buckley, Hon. Elaine M</p>		<a href="#">Image</a>
07/01/2019	<p>Attorney appearance On this date Michael C Barker, Esq. dismissed/withdrawn for Defendant Draper Properties Inc (rec'd 6/28/19)</p>		
07/25/2019	<p>Attorney appearance On this date Timothy Joseph Wadman, Esq. added as Private Counsel for Defendant Draper Properties Inc</p>		<a href="#">Image</a>
09/13/2019	<p>Defendant Draper Properties Inc's Assented to Motion to continue / reschedule an event 11/12/2019 09:00 AM Jury Trial (rec'd 9/12/19)</p>	25	<a href="#">Image</a>

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
09/16/2019	Endorsement on Motion to continue / reschedule an event (#25.0): DENIED The Defendant's Assented to Motion to Reschedule The Trial Date is DENIED. The Court (Gilden, J.) denied on Defendant's Motion for Summary Judgment on September 12, 2018, not September 12, 2019 as represented. On January 15, 2019 the Court (Buckley, J.) allowed a Joint Motion to Continue Trial from August 19, 2019 to November 12, 2019. In their motion both parties confirmed their availability for trial beginning November 12, 2019. The Court marked the case "First Case Out." This is a 2016 case.  Judge: Miller, Hon. Rosalind H		<a href="#">Image</a>
10/15/2019	Request for jurors  -75- jurors requested for Trial on Tuesday, November 12, 2019 before the Honorable Rosalind Miller in Courtroom 10  Judge: Miller, Hon. Rosalind H	25.1	
10/24/2019	Defendant(s) Draper Properties Inc motion filed to compel production of all materials relied upon by Plaintiff's expert Clemente Vega (email)	26	<a href="#">Image</a>
10/24/2019	Draper Properties Inc's Memorandum in support of Defendant's motion to compel production of all materials relied upon by Plaintiff's expert Clemente Vega (email)	26.1	<a href="#">Image</a>
10/28/2019	Defendant Draper Properties Inc's Motion in limine to preclude Loss of Consortium Claims of Plaintiff's Minor Children or, in the alternative, to Require Compulsory Joinder of Claims	27	<a href="#">Image</a>
10/28/2019	General correspondence regarding ORIGINAL of P#26.0 Defendant(s) Draper Properties Inc motion filed to compel production of all materials relied upon by Plaintiff's expert Clemente Vega	28	<a href="#">Image</a>
10/28/2019	General correspondence regarding ORIGINAL of P#26.1 Draper Properties Inc's Memorandum in support of Defendant's motion to compel production of all materials relied upon by Plaintiff's expert Clemente Vega	28.1	<a href="#">Image</a>
10/28/2019	Opposition to p. 27.0 Defendant Draper Properties Inc's Motion in Limine to Preclude Loss of Consortium Claims of Plaintiff's Minor Children or, in the alternative, to Require Compulsory Joinder of Claims -- OPPOSITION filed by Lucas Vicuna	29	<a href="#">Image</a>
10/28/2019	Opposition to P. 26.0 Defendant Draper Properties, Inc. Motion to Compel Production of all materials relied upon by Plaintiff's expert Dr. Clemente Vega--OPPOSITION filed by Lucas Vicuna---AND CROSS-MOTION for a Protective Order.	29.1	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to preclude Speculation regarding Details of Plaintiff's fall	30	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to Admit Evidence from Plaintiff's Treating Providers concerning Range of Payments accepted for Medical Services rendered	30.1	<a href="#">Image</a>
10/29/2019	Opposition to P. 30.1 Defendant's Motion in Limine to Admit Evidence from Plaintiff's Treating Providers concerning range of Payments accepted for Medical Services rendered--OPPOSITION filed by Lucas Vicuna	30.2	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to require Plaintiff to give 24 Hours notice prior to calling any Witnesses at Trial	30.3	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to preclude any Evidence or Argument regarding Insurance Maintained by Defendant	30.4	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to Introduce evidence of Collateral Source Income in the event that Plaintiff Affirmatively Pleads Poverty resulting from the subject Accident	30.5	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to preclude Evidence or Argument regarding Plaintiff's Lost Wages and Loss of Earning Capacity	30.6	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to preclude Evidence or Argument that Defendant Controlled the Means and Methods of Plaintiff's Work	30.7	<a href="#">Image</a>
10/29/2019	Opposition to P. 30.7 Defendant Draper Properties, Inc.'s Motion in Limine to Preclude Evidence or Argument that Defendant Controlled the Means and Methods of Plaintiff's Work--OPPOSITION filed by Lucas Vicuna	30.8	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to preclude Evidence or Argument regarding prior Roof Shoveling by Draper Knitting Employees, Inc.	30.9	<a href="#">Image</a>
10/29/2019	Opposition to P. 30.9 Defendant Draper Properties, Inc.'s Motion in Limine to Preclude Evidence or Argument regarding prior Roof Shoveling by Draper Knitting Employees, Inc.--OPPOSITION filed by Lucas Vicuna	31	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to preclude Plaintiff's Expert Daniel M. Paine, CSE	31.1	<a href="#">Image</a>
10/29/2019	Opposition to P. 31.1 Defendant Draper Properties, Inc.'s Motion in Limine to Preclude Plaintiff's Expert Daniel M. Paine, CSE--OPPOSITION filed by Lucas Vicuna	31.2	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion in limine to preclude any Reference to Defendant's Alleged failure to comply with OSHA Standards	31.3	<a href="#">Image</a>
10/29/2019	Opposition to P. 31.3 Defendant Draper Properties, Inc.'s Motion in Limine to Preclude any Reference to Defendant's Alleged failure to comply with OSHA Standards--OPPOSITION filed by Lucas Vicuna	31.4	<a href="#">Image</a>
10/29/2019	Defendant Draper Properties, Inc.'s Motion for voir dire --Judge-Conducted Individual Voir Dire	31.5	<a href="#">Image</a>
10/29/2019	Opposition to P. 31.5 Defendant Draper Properties, Inc.'s Motion for voir dire --Judge-Conducted Individual Voir Dire--OPPOSITION filed by Lucas Vicuna	31.6	<a href="#">Image</a>
10/29/2019	Rule 9A list of documents filed. Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant)	31.7	<a href="#">Image</a>
10/29/2019	Affidavit of compliance with Superior Court Rule 9A Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant)	31.8	<a href="#">Image</a>
10/29/2019	Certificate of service of attorney or Pro Se: Matthew H Greene, Esq.	31.9	<a href="#">Image</a>
10/29/2019	Request for hearing filed Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant)	32	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to preclude the Defendant from commenting on the Plaintiff's "Immigration status" or from using the term "Illegal Alien"	33	<a href="#">Image</a>
11/01/2019	Opposition to P. 33.0 Plaintiff Lucas Vicuna's Motion in Limine to Preclude the Defendant from commenting on the Plaintiff's "Immigration status" or from using the term "Illegal Alien"--OPPOSITION filed by Draper Properties, Inc.--LIMITED OPPOSITION	33.1	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion for voir dire --Though Attorney Conducted Panel Voir Dire	33.2	<a href="#">Image</a>
11/01/2019	Opposition to P. 33.2 Plaintiff Lucas Vicuna's Motion for voir dire --Thorough Attorney Conducted Panel Voir Dire--OPPOSITION filed by Draper Properties, Inc.	33.3	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to preclude Defendant From Offering Any Evidence of "Collateral Source Income" (Workers' Compensation Benefits)	33.4	<a href="#">Image</a>
11/01/2019	Opposition to P. 33.4 Plaintiff Lucas Vicuna's Motion in Limine to Preclude Defendant From Offering Any Evidence of "Collateral Source Income" (Workers' Compensation Benefits)--OPPOSITION filed by Draper Properties, Inc.	33.5	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to preclude Defendants from mentioning in Openings, Closing, or Cross-Examination, that Plaintiff's Expert, Daniel Paine, did not inspect the subject premises	33.6	<a href="#">Image</a>
11/01/2019	Opposition to P. 33.7 Plaintiff Lucas Vicuna's Motion in Limine to Preclude Defendants from mentioning in Openings, Closing, or Cross-Examination, that Plaintiff's Expert, Daniel Paine, did not inspect the subject premises--OPPOSITION filed by Draper Properties, Inc.	33.7	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to preclude Defendant from offering evidence of, or referring to, Unqualified Layperson' opinions concerning Proper Fall Protection Services	33.8	<a href="#">Image</a>
11/01/2019	Opposition to P. 33.8 Plaintiff Lucas Vicuna's Motion in Limine to Preclude Defendant from offering evidence of, or referring to, Unqualified Layperson' opinions concerning Proper Fall Protection Services--OPPOSITION filed by Draper Properties, Inc.	33.9	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to preclude Defendant from offering evidence of, or referring to, Unqualified Layperson' opinions concerning Proper Fall Protection Services	34	<a href="#">Image</a>
11/01/2019	Opposition to P. 34.0 Plaintiff Lucas Vicuna's Motion in Limine to Preclude Defendant from offering evidence of, or referring to, Unqualified Layperson' opinions concerning Proper Fall Protection Services--OPPOSITION filed by Draper Properties, Inc.	34.1	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to preclude the Defendant from Offering Evidence of, or Commenting on, Any Alleged Prior Bad Acts of the Plaintiff	34.2	<a href="#">Image</a>
11/01/2019	Opposition to P. 34.2 Plaintiff Lucas Vicuna's Motion in Limine to Preclude the Defendant from Offering Evidence of, or Commenting on, Any Alleged Prior Bad Acts of the Plaintiff--OPPOSITION filed by Draper Properties, Inc.	34.3	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to Allow Evidence and Argument that Various OSHA Regulations, Bulletins, Directives, Standards, and Publications applied to the Defendant in the Context of the Snow Removal Project.	34.4	<a href="#">Image</a>
11/01/2019	Opposition to P. 34.3 Plaintiff Luca Vicuna's Motion in Limine to Allow Evidence and Argument that Various OSHA Regulations, Bulletins, Directives, Standards, and Publications applied to the Defendant in the Context of the Snow Removal Project.--OPPOSITION filed by Draper Properties, Inc.	34.5	<a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/01/2019	Rule 9A list of documents filed. Applies To: O'Neill, Esq., Owen Roe (Attorney) on behalf of Vicuna, Lucas (Plaintiff)	34.6	<a href="#">Image</a>
11/01/2019	Certificate of service of attorney or Pro Se: Owen Roe O'Neill, Esq.	34.7	<a href="#">Image</a>
11/01/2019	Request for hearing filed Applies To: O'Neill, Esq., Owen Roe (Attorney) on behalf of Vicuna, Lucas (Plaintiff)	34.8	<a href="#">Image</a>
11/01/2019	Plaintiff Lucas Vicuna's Motion in limine to preclude Defendant from Offering any Evidence or Testimony Regarding OSHA Citations	35	<a href="#">Image</a>
11/01/2019	Opposition to P. 35.0 Plaintiff Lucas Vicuna's Motion in Limine to Preclude Defendant from Offering any Evidence or Testimony Regarding OSHA Citations--OPPOSITION filed by Draper Properties, Inc.	35.1	<a href="#">Image</a>
11/04/2019	Opposition to 29.1 Plaintiffs cross-motion for protective order regarding materials relied upon by plaintiffs expert Clemente Vega - Opposition filed by Draper Properties, Inc. Emailed	36	<a href="#">Image</a>
11/04/2019	Interpreter requested. --Dates of November 13,14,15,18,19,20,21, and 22. Judge Miller, Courtroom 10 (Requested by individual dates electronically and sent via email)	37	<a href="#">Image</a>
11/06/2019	Request for Jury instructions filed by Plaintiff Lucas Vicuna Applies To: Vicuna, Lucas (Plaintiff)	38	<a href="#">Image</a>
11/07/2019	Request for Jury instructions filed by Defendant Draper Properties, Inc.	39	<a href="#">Image</a>
11/07/2019	Witness list Applies To: Vicuna, Lucas (Plaintiff); Draper Properties, Inc. (Defendant)	40	<a href="#">Image</a>
11/07/2019	Endorsement on Motion to (#28.0): Compel Production of all materials Relied Upon by Plaintiff's Expert Clemente Vega DENIED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine (#27.0): to Preclude Loss of Consortium Claims of Plaintiff's Minor Children or, in the Alternative, to Require Compulsory Joinder of Claims DENIED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to preclude (#30.0): Speculation Regarding Details of Plaintiff's Fall ALLOWED without opposition(ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to (#30.1): Admit Evidence From Plaintiff's Treating Providers concerning Range of Payments Accepted for Medical Services Rendered ALLOWED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to (#30.3): Require Plaintiff to Give Twenty-Four Hours' Notice Prior to Calling Any Witnesses at Trial ALLOWED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to preclude (#30.4): Any Evidence Or Argument Regarding Insurance Maintained by Defendant ALLOWED Judge: Miller, Hon. Rosalind H		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to (#30.5): Introduce Evidence of Collateral Source Income in the Event That Plaintiff Affirmatively Pleads Poverty Resulting From The Subject Accident ALLOWED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to preclude (#30.6): Evidence Or Argument Regarding Plaintiff's Lost Wages and Loss of Earning Capacity ALLOWED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to preclude (#30.7): Evidence or Argument That Defendant Controlled The Means and Methods of Plaintiff's Work DENIED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine to preclude (#33.0): The Defendant from Commenting on the Plaintiff's Immigration Status or From Using The Term "Illegal Alien" ALLOWED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine (#33.4): Seeking to Preclude Defendants From Offering Any Evidence of Collateral Source Income (Workers' Compensation Benefits) ALLOWED (ns)		<a href="#">Image</a>



<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
11/07/2019	Endorsement on Motion in limine (#33.6): Seeking to Preclude Defendants From Mentioning in Opening, Closing, or Cross Examination, That Plaintiff's Expert, Daniel Paine, Did Not Inspect The Subject Premises ALLOWED (ns)		
11/07/2019	Endorsement on Motion in limine to preclude (#33.8): Defendant From Offering Evidence of, Or Referring to, Unqualified Laypersons' Opinions Concerning Proper Fall Protection Procedures ALLOWED (ns)		<a href="#">Image</a>
11/07/2019	Endorsement on Motion in limine (#34.0): Seeking to Preclude Defendant from Offering Evidence of, Or Referencing Before The Jury, Irrelevant and Prejudicial Historical Information Regarding "Draper Brothers Company" and "Draper Knitting Company" DENIED (ns)		<a href="#">Image</a>
11/07/2019	Event Result:: Final Trial Conference scheduled on: 11/07/2019 02:00 PM Has been: Held as Scheduled Comments: FTR room 10 - 2:22:54 to Hon. Rosalind H Miller, Presiding		
11/08/2019	Plaintiff Lucas Vicuna's affidavit of written notice of intent to offer as evidence: medical bills pursuant to G.L. c.233, § 79G (1) Brigham and Women's Hospital (Record and Bills) (2) Brigham and Women's Physicians' Organization (Bills) (3) Momentum Physical Therapy (Records and Bills) (4) UMass Memorial Medical Center (Records and Bills) (5) Milford Regional Medical Center (Records and Bills) (6) Anesthesia Associates of Massachusetts (Bills) (7) Spaulding Rehabilitation Hospital (Records and Bills) (8) Massachusetts General Physicians' Organization (Bills) (9) Brigham and Women's Faulkner Hospital (Records and Bills) (10) Lahey Hospital (Records and Bills) (11) Dr. Roger Kinnard (Records and Bills) (12) Canton Fire Department (Records) (13) Partners Health Care at Home (Records and Bills) (14) Hyde park Pain Management (Records)	41	<a href="#">Image</a>
11/08/2019	Brief filed: Reply -Plaintiff Lucas Vicuna's Supplemental Brief in Support of the Admission of Evidence concerning the OSHA Multi-Employer Citation Policy and other OSHA Regulations  Applies To: Vicuna, Lucas (Plaintiff)	42	<a href="#">Image</a>
11/08/2019	Brief filed: -Defendant Draper Properties, Inc.'s Supplemental Brief regarding Applicability of OSHA's Multi-Employer Citation Policy to the Employee of an Independent Contractor hired by a Commercial Property Owner.  Applies To: Draper Properties, Inc. (Defendant)	43	<a href="#">Image</a>
11/12/2019	Event Result:: Jury Trial scheduled on: 11/12/2019 09:00 AM Has been: Held as Scheduled Comments: FTR Room 10 -- 8:55:23 impanelment-- 11 jurors chosen. went until 1:20ish. Afternoon spent time discussing legal issues with counsel and taking voir dire of witness Daniel Paine.. 2:37:38 to 4:30:0043 Hon. Rosalind H Miller, Presiding		
11/13/2019	Request for Jury instructions filed by Defendant Draper Properties, Inc.	44	<a href="#">Image</a>
11/13/2019	Proposed special jury questions  (Rec'd 11/12/19)  Applies To: Draper Properties, Inc. (Defendant)	45	<a href="#">Image</a>
11/13/2019	General correspondence regarding Affidavit of Christine George (Copy) (Rec'd 11/12/19)	46	<a href="#">Image</a>
11/13/2019	Event Result:: Jury Trial scheduled on: 11/13/2019 09:00 AM Has been: Held as Scheduled Comments: FTR Room 10 - 9:04 A.M .to end of morning session Hon. Rosalind H Miller, Presiding		
11/13/2019	Draper Properties, Inc.'s Memorandum Supplemental Brief Regarding Applicability of OSHA's Multi Employer Citation Policy to the Employee of an Independent Contractor Hired by a Commercial Property Owner	47	<a href="#">Image</a>
11/14/2019	Event Result:: Jury Trial scheduled on: 11/14/2019 09:00 AM Has been: Held as Scheduled Comments: FTR Room 10 -- 9:04:52 to 1:23:32 Hon. Rosalind H Miller, Presiding		
11/14/2019	Event Result:: Jury Trial scheduled on: 11/15/2019 09:00 AM Has been: Not Held For the following reason: By Court prior to date		

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
	Comments: Conference - trial not held Hon. Rosalind H Miller, Presiding		
11/18/2019	Plaintiff Lucas Vicuna's Motion to Sanction Defendant for Offering Evidence of M.V. Construction's Insurance in Violation of Pretrial Order	48	
11/18/2019	Opposition to P. 48.0 Plaintiff Lucas Vicuna's Motion to Sanction Defendant for Offering Evidence of M.V. Construction's Insurance in Violation of Pretrial Order--OPPOSITION filed by Draper Properties, Inc.	48.1	
11/18/2019	Event Result:: Jury Trial scheduled on: 11/18/2019 09:00 AM Has been: Held as Scheduled DAY 4 of Jury Trial Comments: Room 10; FTR at 9:00:10 A.M. to 4:10:34 P.M. Hon. Rosalind H Miller, Presiding / Assistant Clerk M. Diane Gibbons Appeared: Plaintiff Owen Roe O'Neill, Esq., Private Counsel Richard J Sullivan, Esq., Private Counsel Defendant Mark William Shaughnessy, Esq., Matthew H Greene, Esq.,		
11/18/2019	Endorsement on Motion for (#48.1): Sanctions against the Defendant, filed by the Plaintiff Lucas Vicuna-- After hearing DENIED  Judge: Miller, Hon. Rosalind H		
11/19/2019	Event Result:: Jury Trial scheduled on: 11/19/2019 09:00 AM Has been: Held as Scheduled Comments: Room 10 FTR at 9:04:46 A.M.to 1:05:43 P.M. DAY 5 of Jury Trial Hon. Rosalind H Miller, Presiding / Assistant Clerk M. Diane Gibbons Appeared: Plaintiff Owen Roe O'Neill, Esq., Private Counsel Richard J Sullivan, Esq., Private Counsel Defendant Mark William Shaughnessy, Esq., Matthew H Greene, Esq.,		
11/20/2019	Event Result:: Jury Trial scheduled on: 11/20/2019 09:00 AM Has been: Held as Scheduled DAY 6 of Jury Trial Comments: Room 10 FTR at 9:09:30 Hon. Rosalind H Miller, Presiding / Ass't Clerk M. Diane Gibbons Appeared: Plaintiff Owen Roe O'Neill, Esq., Private Counsel Richard J Sullivan, Esq., Private Counsel Defendant Mark William Shaughnessy, Esq., Matthew H Greene, Esq.,		
11/20/2019	Plaintiff Lucas Vicuna's Motion to preclude Maria Vicuna and Alfonso Castro from offering Hearsay, Habit or Prior Bad Acts Testimony	49	
11/21/2019	Event Result:: Jury Trial scheduled on: 11/21/2019 09:00 AM Has been: Held as Scheduled DAY 7 of Jury Trial Comments: Room 10 FTR at 8:55:04 to 1:47:55 Hon. Rosalind H Miller, Presiding / Ass't Clerk M. Diane Gibbons Appeared: Plaintiff Owen Roe O'Neill, Esq., Private Counsel Richard J Sullivan, Esq., Private Counsel Defendant Mark William Shaughnessy, Esq., Matthew H Greene, Esq.,		
11/21/2019	Docket Note: --The Jurors were released for the day through Courtroom 3 FTR approximately 4:10 P.M.		
11/22/2019	Event Result:: Jury Trial scheduled on: 11/22/2019 09:00 AM Has been: Held as Scheduled Comments: Room 10 FTR at 9:04 to 9:06:55 to resume deliberations; Jury question at 12:25:37; Answer to question at 12:28:56; Two jury questions at 4:00:39; jury arrives to be dismissed at 4:09:42 and end of session at 4:11:43  Hon. Rosalind H Miller, Presiding / Ass't Clerk M. Diane Gibbons Appeared:		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	<p>Plaintiff Owen Roe O'Neill, Esq., Private Counsel Richard J Sullivan, Esq., Private Counsel</p> <p>Defendant Mark William Shaughnessy, Esq., Matthew H Greene, Esq.,</p>		
11/25/2019	<p>Event Result:: Jury Trial scheduled on: 11/25/2019 09:00 AM Has been: Held as Scheduled DAY 9 of Jury Trial Comments: FTR; Room 10 at 10:04:10; Jury question at 2:06; Additional Jury Charge at 2:13:22; Verdict at 3:49:50; End of session 3:55:25 Hon. Rosalind H Miller, Presiding / Ass't Clerk M. Diane Gibbons Appeared: Plaintiff Owen Roe O'Neill, Esq., Private Counsel Richard J Sullivan, Esq., Private Counsel Defendant Mark William Shaughnessy, Esq., Matthew H Greene, Esq.,</p>		
11/26/2019	<p>Brief filed: --Defendant's Response to Plaintiff's Supplemental Brief in Support of the Admission of Evidence concerning the OSHA Multiemployer Citation Policy and other OSHA Regulations (Re: P. 42.0) (Rec. 11/12/2019)</p> <p>Applies To: Draper Properties, Inc. (Defendant)</p>	50	<a href="#">Image</a>
11/26/2019	Defendant Draper Properties, Inc.'s Motion for Directed Verdict filed at the close of Plaintiffs case (Rec. 11/20/2019)	51	<a href="#">Image</a>
11/26/2019	Endorsement on Motion for Directed Verdict filed (#51.0): at the close of plaintiff's case- DENIED (Dated 11/20/2019)		<a href="#">Image</a>
11/26/2019	Defendant Draper Properties, Inc.'s Motion for Directed Verdict filed at the close of the evidence (Rec. 11/21/2019)	52	<a href="#">Image</a>
11/26/2019	Endorsement on Motion for Directed Verdict filed (#52.0): filed at the close of all the evidence- DENIED (Dated 11/21/2019)		<a href="#">Image</a>
11/26/2019	<p>Verdict of jury for party</p> <p>--QUESTION (1) Was the Defendant Draper Properties, Inc. negligent; ANSWER, Yes --QUESTION (2) Was the negligence, if any, of the Defendant Draper Properties, Inc., a substantial contributing factor in causing injury or harm to the Plaintiff, Lucas Vicuna?; ANSWER, Yes --QUESTION (3) Did Draper Properties, Inc. retain control over the work of MV Construction; ANSWER, No --QUESTION (4) Not Answered --QUESTION (5) Not Answered --QUESTION (6) Was the Plaintiff Lucas Vicuna, himself negligent; ANSWER; Yes --QUESTION (7) Was the negligence, if any, of the Plaintiff Lucas Vicuna, a substantial contributing factor in causing his own injuries?; ANSWER, Yes --QUESTION (8) What percentage of fault for the Plaintiff's accident is attributable to --A. Draper Properties; 30%; B. Lucas Vicuna; 70%. --QUESTION (9) Not Answered Verdict Signed, Dated and Recorded on 11/25/2019 cs</p> <p>Applies To: Draper Properties, Inc. (Defendant)</p>	53	<a href="#">Image</a>
11/26/2019	General correspondence regarding --OFFICIAL Courtroom FTR Time list of Courtroom Activity for 11/14/2019, 11/18/2019, 11/19/2019, 11/20/2019, 11/21/2019, 11/22/2019, and 11/25/2019.	54	<a href="#">Image</a>
11/26/2019	<p>List of exhibits</p> <p>--OFFICIAL Exhibit List from Trial (Exhibits filed in the Exhibit room; One Box containing 1 Folder and 7 binders)</p>	55	<a href="#">Image</a>
11/26/2019	<p>JUDGMENT on jury verdict for the Defendant(s), Draper Properties, Inc. against Plaintiff(s), Lucas Vicuna, who will recover statutory costs. --After a Trial before the Court and a Jury, the Honorable Rosalind H. Miller presiding and the Jury having returned a Verdict for the Defendant, WHEREFORE, it is ORDERED and ADJUDGED that that the Plaintiff Lucas Vicuna take nothing, that the action be Dismissed on the merits and that the Defendant Draper Properties, Inc., recover of the Plaintiff Lucas Vicuna, it's statutory costs of action. cs</p> <p>Judge: Miller, Hon. Rosalind H</p>	56	
12/03/2019	Request for Jury instructions filed by Plaintiff Lucas Vicuna Supplemental Request for Jury Instructions (Rec. 11/19/2019)	57	<a href="#">Image</a>

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
12/09/2019	Attorney appearance On this date Thomas P Kelley, Esq. added for Plaintiff Lucas Vicuna		
12/09/2019	Plaintiff's Notice of intent to file motion to amend judgment (Rec'd. 12/6/2019)  Applies To: Vicuna, Lucas (Plaintiff)	58	
12/23/2019	Notice of appeal filed.  Applies To: Vicuna, Lucas (Plaintiff)	59	<a href="#">Image</a>
12/23/2019	Plaintiff Lucas Vicuna's Motion to amend the judgment	60	<a href="#">Image</a>
12/23/2019	Opposition to to plaintiffs motion to amend judgment. Opposition filed by Draper Properties, Inc.	60.1	<a href="#">Image</a>
12/23/2019	Affidavit of compliance with Superior Court Rule 9A  Applies To: Vicuna, Lucas (Plaintiff)	60.2	<a href="#">Image</a>
12/23/2019	Rule 9A list of documents filed.	60.3	<a href="#">Image</a>
12/24/2019	Endorsement on Motion to amend the Judgment dated 11/26/2019--After review of the written submissions of the parties, Plaintiff's Motion to Amend the Judgment is (#60.0): ALLOWED --The taxation of costs was a clerical error. cs		<a href="#">Image</a>
12/24/2019	Judgment / Order VACATED (#56.0); --The within Judgment on Jury Verdict (P.56.0) is Vacated pursuant to the Order of 12/24/2019 P. 60.0; New Amended Judgment on Jury Verdict to issue. cs		<a href="#">Image</a>
12/24/2019	AMENDED JUDGMENT on jury verdict for the Defendant(s), Draper Properties, Inc. against Plaintiff(s), Lucas Vicuna, who will not recover statutory costs. --After a Trial before the Court and a Jury, the Honorable Rosalind H. Miller presiding and the Jury having returned a Verdict for the Defendant, WHEREFORE, it is ORDERED and ADJUDGED that that the Plaintiff Lucas Vicuna take nothing, that the action be Dismissed on the merits. cs	61	<a href="#">Image</a>
01/08/2020	Notice of appeal filed titled Defendant Draper Properties, Inc's Notice of Cross-Appeal filed by Defendant Draper Properties, Inc. Defendant, Draper Properties, Inc. ("Defendant"), hereby provides notice of its intent to pursue a cross-appeal of the Court's decision to permit the Plaintiff, Lucas Vicuna ("Plaintiff"), to offer the expert testimony of Daniel Paine (Docket No. 31.1) and to present two potential theories of liability on the Special Questions Jury Verdict (Docket No. 53). This position of Defendant's cross-appeal is limited to the Court's decision to permit Paine to testify regarding his vague and unsupported opinions as to the duties owed by a commercial property owner, as well as the Court's inclusion of Questions 1 and 2, which contemplate liability premised on Defendant's duty as a property owner. In addition, Defendant intends to pursue a cross-appeal of the Court's order allowing Plaintiff to present evidence regarding prior roof shoveling performed by employees of Draper Knitting, Inc (Docket No. 31). Finally, Defendant intends to pursue a cross-appeal of the Court's Amended Judgment, dated December 24, 2019 (Docket No. 61), insofar as it prevents Defendant from seeking to recover its statutory costs. (rec'd 1/7/20)  Applies To: Draper Properties, Inc. (Defendant)	62	<a href="#">Image</a>
01/08/2020	Notice of appeal sent to  Applies To: Shaughnessy, Esq., Mark William (Attorney) on behalf of Draper Properties, Inc. (Defendant); O'Neill, Esq., Owen Roe (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Sullivan, Esq., Richard J (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant); Kelley, Esq., Thomas P (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Wadman, Esq., Timothy Joseph (Attorney) on behalf of Draper Properties, Inc. (Defendant)	63	<a href="#">Image</a>
01/10/2020	Notice of appeal filed by plaintiff Lucas Vicuna for the Amended Judgment dated December 24, 2019 against him in favor of the Defendant Draper Properties Inc  Applies To: Vicuna, Lucas (Plaintiff)	64	<a href="#">Image</a>
01/10/2020	Notice of appeal sent to  Applies To: O'Neill, Esq., Owen Roe (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Sullivan, Esq., Richard J (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant); Kelley, Esq., Thomas P (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Wadman, Esq., Timothy Joseph (Attorney) on behalf of Draper Properties, Inc. (Defendant); Event Judge: Gildea, Hon. Mark	65	<a href="#">Image</a>
01/15/2020	Defendant Draper Properties, Inc.'s Motion for post judgment taxation of costs, pursuant to MGL c261sec1 and MRCP Rule 54(rec'd 1/13/2020)	66	<a href="#">Image</a>
01/15/2020	Opposition to p#66.0 Defendant Draper Properties Inc's motion for post-judgment taxation of costs - opposition filed by Lucas Vicuna	66.1	<a href="#">Image</a>



<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
	(rec'd 1/13/2020)		
01/15/2020	Affidavit of compliance with Superior Court Rule 9A (rec'd 1/13/2020)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant)	66.2	<a href="#">Image</a>
01/15/2020	Rule 9A list of documents filed.  (rec'd 1/13/2020)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant)	66.3	<a href="#">Image</a>
01/15/2020	Rule 9A notice of filing  (rec'd 1/13/2020)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant)	66.4	
01/15/2020	Request for hearing filed  (rec'd 1/13/2020)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant)	66.5	<a href="#">Image</a>
01/16/2020	Docket Note: P#66.0 to 66.5 emailed to Judge Miller		
01/23/2020	Certification/Copy of Letter of transcript ordered from Court Reporter 11/07/2019 02:00 PM Final Trial Conference, 11/12/2019 09:00 AM Jury Trial, 11/13/2019 09:00 AM Jury Trial, 11/14/2019 09:00 AM Jury Trial, 11/18/2019 09:00 AM Jury Trial, 11/19/2019 09:00 AM Jury Trial, 11/20/2019 09:00 AM Jury Trial, 11/21/2019 09:00 AM Jury Trial, 11/22/2019 09:00 AM Jury Trial, 11/25/2019 09:00 AM Jury Trial  Applies To: Vicuna, Lucas (Plaintiff)	67	<a href="#">Image</a>
07/16/2020	CD of Transcript of 11/07/2019 02:00 PM Final Trial Conference, 11/12/2019 09:00 AM Jury Trial, 11/13/2019 09:00 AM Jury Trial, 11/14/2019 09:00 AM Jury Trial, 11/18/2019 09:00 AM Jury Trial, 11/19/2019 09:00 AM Jury Trial, 11/20/2019 09:00 AM Jury Trial, 11/21/2019 09:00 AM Jury Trial, 11/22/2019 09:00 AM Jury Trial, 11/25/2019 09:00 AM Jury Trial received from Nancy B. Gardelli. 1 CD	68	
07/16/2020	Notice of assembly of record sent to Counsel  Applies To: Shaughnessy, Esq., Mark William (Attorney) on behalf of Draper Properties, Inc. (Defendant); O'Neill, Esq., Owen Roe (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Sullivan, Esq., Richard J (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties, Inc. (Defendant); Kelley, Esq., Thomas P (Attorney) on behalf of Vicuna, Lucas (Plaintiff); Wadman, Esq., Timothy Joseph (Attorney) on behalf of Draper Properties, Inc. (Defendant)		
07/16/2020	Notice to Clerk of the Appeals Court of Assembly of Record	69	<a href="#">Image</a>
07/16/2020	Appeal: Statement of the Case on Appeal (Cover Sheet).	70	
07/29/2020	Appeal entered in Appeals Court on 07/24/2020 docket number 2020-P-0831 (rec'd 7/27/2020)	71	<a href="#">Image</a>
08/02/2021	Rescript received from Appeals Court; judgment AFFIRMED Amended Judgment Affirmed. (rec'd 7/30/21)	72	<a href="#">Image</a>
08/02/2021	JUDGMENT/ORDER after Rescript: The original judgment (#61.0) is Affirmed. (cs)	73	<a href="#">Image</a>
08/10/2021	Notice to claim trial exhibits on or before 08/31/2021 --One BOX containing Trial Exhibits		
08/13/2021	Exhibits Returned to Thomas Kelly, Esq.		

Due to system maintenance beginning approximately 4 pm on Thursday, Mar 23rd, 2023, this website will be unavailable until the maintenance is completed approximately 6 pm.

# Exhibit 3

APPEALS COURT  
Full Court Panel Case  
Case Docket

LUCAS VICUNA vs. DRAPER PROPERTIES, INC  
2020-P-0831

CASE HEADER

Case Status	Closed: Rescript issued	Status Date	07/30/2021
Nature	Tort	Entry Date	07/24/2020
Appellant	Both Plf & Deft	Case Type	Civil
Brief Status		Brief Due	
Arg/Submitted	05/06/2021	Decision Date	07/02/2021
Panel	Wolohojian, Milkey, Shin, JJ.	Citation	99 Mass. App. Ct. 1132
Lower Court	Norfolk Superior Court	TC Number	1682CV01105
Lower Ct Judge	Rosalind Henson Miller, J.	TC Entry Date	08/29/2016
SJ Number		FAR Number	
SJC Number			

INVOLVED PARTY

**Lucas Vicuna**  
Plaintiff/Appellant  
Blue br, app & reply br filed  
1 Enl, 33 Days

**Draper Properties, Inc**  
Defendant/Appellee  
Blue brief & reply br filed  
2 Enls, 44 Days

ATTORNEY APPEARANCE

[Thomas P. Kelley, Esquire](#)  
[Owen R. O'Neill, Esquire](#)  
[Thomas P. Kelley, Esquire](#)

[Mark W. Shaughnessy, Esquire](#)  
[Matthew H. Greene, Esquire](#)  
[Timothy Joseph Wadman, Esquire](#)

DOCUMENTS

[Appellant Brief](#)   
[Appellee Brief](#) 

[Reply Vicuna Brief](#)   
[Draper Properties Inc Reply Brief](#) 

ORAL ARGUMENTS

0:00 / 0:00

DOCKET ENTRIES

Entry Date	Paper	Entry Text
07/31/2020		**** Cross Appeal ****
07/24/2020	#1	Lower Court Assembly of the Record Package
07/24/2020		Notice of entry sent.
07/24/2020	#2	Civil Appeal Entry Form filed for Lucas Vicuna by Attorney Thomas Kelley.
07/31/2020	#3	Civil Appeal Entry Form filed for Draper Properties, Inc by Attorney Matthew Greene.
07/31/2020	#4	Motion for misc relief (Certificate of Service 07.30.20) filed for Draper Properties, Inc by Attorney Matthew Greene.
08/06/2020	#5	Docketing Statement filed for Draper Properties, Inc by Attorney Matthew Greene.
08/06/2020	#6	Docketing Statement filed for Lucas Vicuna by Attorney Thomas Kelley.
08/28/2020	#7	Motion of Appellant to extend date for filing brief and appendix filed for Lucas Vicuna by Attorney Thomas Kelley.
08/28/2020		RE#7: Allowed to 10/05/2020. Notice sent.
10/05/2020	#8	Appellant brief filed for Lucas Vicuna by Attorney Thomas Kelley.
10/05/2020	#9	Appendix (Vol I of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.
10/05/2020	#10	Appendix (Vol II of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.
10/05/2020	#11	Appendix (Vol III of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.
10/05/2020	#12	Appendix (Vol IV of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.
10/05/2020	#13	Appendix (Vol V of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.

10/05/2020	#14	Transcript (Vol VI of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.
10/05/2020	#15	Transcript (Vol VI of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.
10/05/2020	#16	Transcript (Vol VIII of VIII) filed for Lucas Vicuna by Attorney Thomas Kelley.
10/14/2020	#17	MOTION of Appellee to extend brief due date filed for Draper Properties, Inc by Attorney Matthew Greene.
10/15/2020		RE#17: Allowed to 12/04/2020. Notice sent.
12/02/2020	#18	MOTION of Appellee to extend brief due date filed for Draper Properties, Inc by Attorney Matthew Greene.
12/02/2020		RE#18: Allowed to 12/18/2020. Notice sent.
12/18/2020	#19	Appellee brief filed for Draper Properties, Inc by Attorney Matthew Greene.
01/08/2021	#20	Motion of Appellant to extend date for filing Reply Brief filed for Lucas Vicuna by Attorney Thomas Kelley.
01/11/2021		RE#20: Allowed to 02/01/2021. *Notice
02/01/2021	#21	Reply brief filed for Lucas Vicuna by Attorney Thomas Kelley.
02/10/2021	#22	MOTION of Appellee to extend brief due date filed for Draper Properties, Inc by Attorney Matthew Greene.
02/10/2021		RE#22: Allowed to 03/01/2021. *Notice
03/01/2021	#23	Reply brief filed for Draper Properties, Inc by Attorney Matthew Greene.
03/10/2021		Notice sent seeking information on unavailability for oral argument in May 2021
03/10/2021		Response from Thomas P. Kelley, Esquire re: available all dates for oral argument..
03/15/2021		Response from Timothy Joseph Wadman, Esquire re: available all dates for oral argument..
03/31/2021	#24	Notice of 05/06/2021, 9:30 AM argument at Videoconference (A3) (a3vc) sent.
03/31/2021		Response from Thomas P. Kelley, Esquire re: will appear and argue on 05/06/2021.
04/01/2021		Response from Matthew H. Greene, Esquire re: will appear and argue on 05/06/2021.
04/21/2021	#25	REVISED Notice of (panel change) 05/06/2021, 9:30 AM argument at Videoconference (A3) (a3vc) sent.
04/21/2021		Response from Thomas P. Kelley, Esquire re: will appear and argue on 05/06/2021.
04/22/2021		Response from Matthew H. Greene, Esquire re: will appear and argue on 05/06/2021.
05/06/2021		Oral argument held. (Wolohojian, J., Milkey, J., Shin, J.).
05/10/2021	#26	MOTION to file supplemental appendix filed for Draper Properties, Inc by Attorney Matthew Greene.
05/11/2021	#27	Letter pursuant to MRAP 16(l) filed for Draper Properties, Inc by Attorney Matthew Greene.
07/02/2021		RE#26: No action necessary. (Wolohojian, Milkey, Shin, JJ.). *Notice
07/02/2021	#28	Decision: Rule 23.0 Amended judgment affirmed. (Wolohojian, Milkey, Shin, JJ.). *Notice.
07/30/2021		RESCRIPT to Trial Court.

As of 07/30/2021 4:15pm

# Exhibit 4

# 2182CV00762 Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna et al vs. Draper Properties Inc.

- Case Type:
- Torts
- Case Status:
- Open
- File Date
- 08/17/2021
- DCM Track:
- F - Fast Track
- Initiating Action:
- Other Negligence - Personal Injury / Property Damage
- Status Date:
- 08/17/2021
- Case Judge:
- 
- Next Event:
- 

[All Information](#) [Party](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

## Docket Information

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
08/17/2021	Attorney appearance On this date Owen Roe O'Neill, Esq. added for Plaintiff Araceli Arguello as parent and next friend of minor child Juan Ernesto Vicuna Reyes		
08/17/2021	Attorney appearance On this date Owen Roe O'Neill, Esq. added for Plaintiff Araceli Arguello as parent and next friend of minor child Joshua Daniel Vicuna		
08/17/2021	Attorney appearance On this date Owen Roe O'Neill, Esq. added for Plaintiff Lucas Vivuna as parent and next friend of minor child Juan Ernesto Vicuna Reyes		
08/17/2021	Attorney appearance On this date Owen Roe O'Neill, Esq. added for Plaintiff Lucas Vivuna as parent and next friend of minor child Joshua Vicuna		
08/17/2021	Case assigned to: DCM Track F - Fast Track was added on 08/17/2021		
08/17/2021	Original civil complaint filed.	1	<a href="#">Image</a>
08/17/2021	Civil action cover sheet filed.	2	<a href="#">Image</a>
08/17/2021	Araceli Arguello as parent and next friend of minor child Juan Ernesto Vicuna Reyes, Araceli Arguello as parent and next friend of minor child Joshua Daniel Vicuna, Lucas Vivuna as parent and next friend of minor child Joshua Vicuna's MOTION for appointment of Special Process Server.	3	<a href="#">Image</a>
08/18/2021	Endorsement on Motion of special process server (#3.0): ALLOWED Motion is Allowed (Cannone, J) (Dated: 8/18/2021)		<a href="#">Image</a>
08/22/2021	One Trial case reviewed by Clerk, case to remain in the Superior Court.  Judge: Hickey, Mary K		
08/25/2021	Docket Note: 1 summons mailed on this day		
09/29/2021	Attorney appearance On this date Matthew H Greene, Esq. added for Other interested party Matthew H Greene, Esq.		
09/29/2021	Service Returned for Defendant Draper Properties Inc.: Service accepted by counsel Matthew H. Greene, Esq. who has been authorized to accept service by his client/defendant on September 21, 2021.	4	<a href="#">Image</a>

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
	Applies To: Draper Properties Inc. (Defendant)		
11/10/2021	Attorney appearance electronically filed.		<a href="#">Image</a>
11/10/2021	Attorney appearance electronically filed.		<a href="#">Image</a>
11/10/2021	Attorney appearance electronically filed.		<a href="#">Image</a>
11/12/2021	Attorney appearance On this date Timothy Joseph Wadman, Esq. added as Private Counsel for Defendant Draper Properties Inc.		
11/12/2021	Attorney appearance On this date Matthew H Greene, Esq. added as Private Counsel for Defendant Draper Properties Inc.		
11/12/2021	Attorney appearance On this date Mark William Shaughnessy, Esq. added as Private Counsel for Defendant Draper Properties Inc.		
11/12/2021	Party(s) file Stipulation of extension for defendant Draper Properties, Inc. to file responsive pleading (Assented to) (Rec'd 11/10/2021)  Applies To: Draper Properties Inc. (Defendant)	5	<a href="#">Image</a>
11/15/2021	Endorsement on Stipulation to Extend time for Defendant Draper Properties, Inc. to file a responsive pleading (#5.0): Other action taken --Treated as an Assented to Motion to extend time to file a responsive pleading and Allowed as such; the time is extended to 12/17/2021. (Dated 11/12/2021) cs		<a href="#">Image</a>
12/16/2021	Defendant Draper Properties Inc.'s Notice of Motion to Dismiss (efiled 12/16/21)	6	<a href="#">Image</a>
02/10/2022	Defendant Draper Properties Inc.'s Motion to dismiss plaintiffs' lost of consortium complaint. (E-FILE received 2/9/2022)	7	<a href="#">Image</a>
02/10/2022	Draper Properties Inc.'s Memorandum in support of Motion to dismiss plaintiffs' loss of consortium complaint. (E-FILE received 2/9/2022)	7.1	<a href="#">Image</a>
02/10/2022	Opposition to to defendant's Motion to dismiss.-----OPPOSITION filed by Araceli Arguello as parent and next friend of minor child Juan Ernesto Vicuna Reyes-ET AL (E-FILE received 2/9/2022)	7.2	<a href="#">Image</a>
02/10/2022	Reply/Sur-reply  Defendant Draper Properties, Inc's Reply in further support of its Motion to dismiss plaintiffs' loss consortium complaint. (E-FILE received 2/9/2022)	7.3	<a href="#">Image</a>
02/10/2022	Request for hearing filed  (E-FILE received 2/9/2022)  Applies To: Draper Properties Inc. (Defendant)	7.4	<a href="#">Image</a>
02/10/2022	Affidavit of compliance with Superior Court Rule 9C (E-FILE received 2/9/2022)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc. (Defendant)	7.5	<a href="#">Image</a>
02/10/2022	Affidavit of compliance with Superior Court Rule 9A (E-FILE received 2/9/2022)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc. (Defendant)	7.6	<a href="#">Image</a>
02/10/2022	Rule 9A notice of filing  (E-FILE received 2/9/2022)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc. (Defendant)	7.7	<a href="#">Image</a>
02/10/2022	Rule 9A list of documents filed.  (E-FILE received 2/9/2022)  Applies To: Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc. (Defendant)	7.8	<a href="#">Image</a>

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
05/04/2022	General correspondence regarding -Letter received from Plaintiffs' Counsel, Owen R. O'Neill, Esq. requesting a Hearing on the pending Motion to Dismiss and Opposition.	8	<a href="#">Image</a>
05/11/2022	The following form was generated:  Notice to Appear on July 20, 2022 at 3:00 P.M for hearing on P. 7.0 Defendant's Motion to Dismiss; P. 7.1 Memo in Support; P. 7.2 Plaintiffs Opposition; P. 7.3 Reply Memo. Hearing is IN PERSON unless notified by the clerk of otherwise. cs Sent On: 05/11/2022 15:28:39	9	
07/20/2022	Event Result:: Rule 12 Hearing scheduled on: 07/20/2022 03:00 PM Has been: Held as Scheduled Comments: In person Hon. Joseph Leighton, Presiding*CORRECTION Hon. Paul Wilson PRESIDING		
07/27/2022	Attorney appearance On this date Richard J Sullivan, Esq. added for Plaintiff Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna		
07/27/2022	Attorney appearance On this date Thomas P Kelley, Esq. added for Plaintiff Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna		
07/27/2022	Attorney appearance On this date Richard J Sullivan, Esq. added for Plaintiff Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna		
07/27/2022	Attorney appearance On this date Thomas P Kelley, Esq. added for Plaintiff Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna		
08/15/2022	JUDGMENT on Defendants, Draper Properties Inc. 12(b) motion to dismiss against Plaintiff(s) Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna. It is ORDERED and ADJUDGED: That Defendant Draper Properties, Inc.'s Motion to Dismiss Plaintiffs' Loss of Consortium Complaint is ALLOWED. Wilson, J. 8/12/22  Judge: Masse, Steven	10	<a href="#">Image</a>
08/16/2022	Docket Note: Certified copies of P#10.0 Judgment on Motion to dismiss was sent on this date.		
08/16/2022	MEMORANDUM & ORDER:  MEMORANDUM OF DECISION AND ORDER ON DEFENDANT DRAPER PROPERTIES, INC.'S MOTION TO DISMISS PLAINTIFFS' LOSS OF CONSORTIUM COMPLAINT. (dated August 12, 2022) certified copies sent ni  Judge: Wilson, Hon. Paul D	11	<a href="#">Image</a>
09/02/2022	MEMORANDUM & ORDER:  (CORRECTED) MEMORANDUM OF DECISION AND ORDER ON DEFENDANT DRAPER PROPERTIES, INC.'S MOTION TO DISMISS PLAINTIFFS' LOSS OF CONSORTIUM COMPLAINT September 2, 2022 certified copies sent JM  Judge: Wilson, Hon. Paul D	12	<a href="#">Image</a>
09/13/2022	Notice of appeal filed. Plaintiffs appeal this Court's Judgment on Motion to Dismiss against them in favor of the defendant, Draper Properties, Inc., Dated August 12, 2022 and entered on August 15, 2022 (E-filed)  Applies To: O'Neill, Esq., Owen Roe (Attorney) on behalf of Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna (Plaintiff)	13	<a href="#">Image</a>
09/30/2022	Notice of appeal sent to  Applies To: Shaughnessy, Esq., Mark William (Attorney) on behalf of Draper Properties Inc. (Defendant); O'Neill, Esq., Owen Roe (Attorney) on behalf of Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna (Plaintiff); Sullivan, Esq., Richard J (Attorney) on behalf of Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna (Plaintiff); Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc. (Defendant); Kelley, Esq., Thomas P (Attorney) on behalf of Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of	14	<a href="#">Image</a>



<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
	minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna (Plaintiff); Wadman, Esq., Timothy Joseph (Attorney) on behalf of Draper Properties Inc. (Defendant)		
02/01/2023	ORDER sent for Status Review of Appeal, if notice is not received by 03/01/2023 the Appeal will be dismissed. cs	15	<a href="#">Image</a>
02/14/2023	CD of Transcript of 07/20/2022 03:00 PM Rule 12 Hearing received from Lisa Marie Phipps. 1 Electronic Copy (email)	16	
02/14/2023	Notice of assembly of record sent to Counsel  Applies To: Shaughnessy, Esq., Mark William (Attorney) on behalf of Draper Properties Inc. (Defendant); O'Neill, Esq., Owen Roe (Attorney) on behalf of Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna (Plaintiff); Sullivan, Esq., Richard J (Attorney) on behalf of Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna (Plaintiff); Greene, Esq., Matthew H (Attorney) on behalf of Draper Properties Inc. (Defendant); Kelley, Esq., Thomas P (Attorney) on behalf of Araceli Arguello as Parent and Next Friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna, Lucas Vicuna as Parent and Next friend of minor children Juan Ernesto Vicuna and Joshua Daniel Vicuna (Plaintiff); Wadman, Esq., Timothy Joseph (Attorney) on behalf of Draper Properties Inc. (Defendant)		
02/14/2023	Notice to Clerk of the Appeals Court of Assembly of Record	17	<a href="#">Image</a>
02/14/2023	Appeal: Statement of the Case on Appeal (Cover Sheet).	18	<a href="#">Image</a>
03/02/2023	Appeal entered in Appeals Court on 02/28/2023 docket number 2023-P-0226 (rec'd 3/1/23)	19	<a href="#">Image</a>

Due to system maintenance beginning approximately 4 pm on Thursday, Mar 23rd , 2023, this website will be unavailable until the maintenance is completed approximately 6 pm.

# Exhibit 5

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT (DEDHAM)  
C.A. No.: 1682CV01105

LUCAS VICUNA )  
Plaintiff )  
v. )  
DRAPER PROPERTIES, INC. )  
Defendant )

OFFICE OF THE  
CLERK OF THE  
SUPERIOR COURT  
NORFOLK COUNTY  
MASSACHUSETTS  
RECEIVED  
OCT 22 2019  
11 25 AM

**DEFENDANT'S MOTION IN LIMINE TO PRECLUDE LOSS OF CONSORTIUM  
CLAIMS OF PLAINTIFF'S MINOR CHILDREN OR, IN THE ALTERNATIVE,  
TO REQUIRE COMPULSORY JOINDER OF CLAIMS**

NOW COMES the defendant, Draper Properties, Inc. ("Defendant"), and hereby moves *in limine* to preclude any claims for loss of consortium asserted by or on behalf of plaintiff Lucas Vicuna's ("Plaintiff") minor children.<sup>1</sup> In the alternative, Defendant requests that the Court order Plaintiff's minor children's claims for loss of consortium to be compulsorily joined in this matter.

On October 22, 2019, for the first time in this litigation, Plaintiff's counsel indicated an intent to pursue claims for loss of consortium on behalf of Plaintiff's two minor children in connection with their alleged ongoing loss of their father's companionship and society as a result of the subject accident. *See* Exhibit 1, Letter from Plaintiff's Counsel, dated October 22, 2019. The notice letter from Plaintiff's counsel purports to contemplate asserting these claims in a separate action following the trial in this matter.

The Court should preclude Plaintiff and his counsel from pursuing these claims on behalf of Plaintiff's two minor children because they failed to assert the claims in a timely manner.

<sup>1</sup> This motion has been filed directly with the Court, with a copy simultaneously served upon the Plaintiff, because Plaintiff's intent to pursue the subject claims was not articulated until Defendant could no longer comply with Rule 9A's timetable for service and filing.

Plaintiff and his counsel have been aware of the potential loss of consortium claims since the commencement of this litigation, more than three years ago, and should have joined Plaintiff's minor children as Rule 19 indispensable parties during the pendency of this action. Instead, they waited until three weeks before trial to notify Defendant of their intent to pursue such claims, depriving Defendant of any meaningful opportunity to conduct discovery and evaluate the nature and extent of their alleged consortium damages. Given this inexcusable, prejudicial delay, the Court should preclude Plaintiff and his counsel from asserting such claims.

In the alternative, should the Court permit the loss of consortium claims to proceed, the claims should be asserted in the instant action or be deemed waived. Asserting the claims in the instant action would serve the judicial economy as it would obviate the need for a separate trial involving the same parties, the same counsel and the same incident. Further, allowing the claims to proceed as Plaintiff's counsel intends would open the door to an influx of segmented litigation whereby plaintiffs could bring successive actions on behalf of injured parties and their spouses and children in order to take multiple swings at potentially liable parties and compound their aggregate recovery, while wasting the Court's resources and unnecessarily inflating defense costs. Accordingly, the claims of Plaintiff's minor children should be asserted and adjudicated in the instant action, if at all.

## **I. BACKGROUND**

### **A. Factual Background**

This action arises out of an accident that occurred at Defendant's business complex located at 28 Draper Lane, Canton, Massachusetts. *See generally*, Complaint. On February 18, 2015, Plaintiff fell from the roof of Building 5 at Defendant's complex while shoveling snow from the roof in the course of his employment for an independent roofing contractor, MV Construction. *See*

*id.* at ¶ 3. As a result of the accident, Plaintiff sustained several injuries, including a “severe head injury” which required multiple surgeries and resulted in memory loss. *See* Exhibit 2, Plaintiff’s Answers to Defendant’s Interrogatories, at Answers No. 2, 11-12.

### **B. Procedural Background**

Plaintiff commenced this action on August 26, 2016, asserting a single count of negligence against Defendant premised on its maintenance of the premises, supervision of his work, and failure to warn of a hazardous condition. *See* Complaint, at ¶¶ 5-8. Plaintiff’s two minor children were not identified as plaintiffs in the Complaint, and Plaintiff has taken no steps to amend his pleadings to add them as plaintiffs to date.

On October 22, 2019, more than three years after the commencement of this action and just three weeks before the start of trial, Plaintiff’s counsel served a letter upon Defendant and defense counsel containing written notice of his intent to pursue loss of consortium claims on behalf of Plaintiff’s two sons, Juan Ernesto Vicuna, age 13, and Joshua Daniel Vicuna, age 6. *See* Ex. 1. Counsel indicates that he represents Plaintiff’s children in connection with their “substantial loss of consortium claims” resulting from the February 18, 2015 accident at issue in the instant suit. *See id.* Further, the letter contemplates asserting the claims in a separate lawsuit following the trial in this case, as it references the use of “any finding of negligence against [Defendant]” as offensive collateral estoppel on the issue of liability in a subsequent action. *Id.* (emphasis in original).

## **II. ARGUMENT**

### **A. The Loss of Consortium Claims are Untimely and Prejudicial**

The Court should preclude Plaintiff and his counsel from asserting any claims for loss of consortium on behalf of Plaintiff’s minor children because Plaintiff’s counsel’s inexcusable delay

in asserting such claims has unfairly prejudiced Defendant. Plaintiff has been represented by the same counsel since the commencement of this action in August, 2016. *See generally*, Complaint. As his counsel's recent letter states, both of Plaintiff's minor children were alive at the time of the accident in February, 2015, and have allegedly experienced "continuing loss of their father's companionship and society" since that time. *See* Ex. 1. Consequently, their claims for loss of consortium have been readily available to Plaintiff's counsel since the beginning of the instant litigation. Despite having knowledge of the underlying facts and alleged injuries, Plaintiff's counsel did not notify Defendant of his intent to pursue claims for loss of consortium on behalf of Plaintiff's children until October 22, 2019 – more than three years after the commencement of this action, and just three weeks before the trial. Plaintiff's counsel's late notice of these additional claims occurred as the parties were working diligently to narrow the disputed trial issues through motions in limine to ensure a focused, expedient resolution of this litigation. Given counsel's substantial delay in acting on previously-known causes of action, the Court should preclude Plaintiff and his counsel from pursuing the children's loss of consortium claims.

Moreover, the loss of consortium claims are untimely as Plaintiff's minor children should have been compulsorily joined under Rule 19 as indispensable parties to this action long ago. Under Mass. R. Civ. P. 19(a), a non-party is subject to compulsory joinder if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Under Massachusetts law, claims for loss of consortium should be compulsorily joined and presented together with the negligence claim

for personal injuries in a single action. *See Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 162 (1973). *See, e.g. Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 516, n.12 (1980).

Here, the Court should preclude any claims for loss of consortium on behalf of Plaintiff's minor children, because Plaintiff failed to join his minor children as Rule 19 plaintiffs in this action. While Plaintiff's children's claims for loss of consortium are independent claims, they are contingent upon a finding of negligence against Defendant in connection with the subject accident. As such, for purposes of Rule 19, their absence from this action would impede their ability to protect that interest. Further, and as addressed more fully below, if Plaintiff's children pursued their loss of consortium claims in a subsequent action, as Plaintiff's counsel intends, Defendant would incur a substantial risk of owing double or multiple obligations stemming from the same incident.

The Supreme Judicial Court's holding in *Diaz* is squarely on point. There, the plaintiff's husband commenced a negligence action to recover for injuries he sustained as a result of his use of a defective and dangerous product, and the plaintiff subsequently filed a separate action to recover for loss of consortium. *See Diaz*, 364 Mass. at 154. In considering the relatedness of the two actions, the SJC noted that "[a]s a practical matter, the consortium claim . . . will usually be presented together with the negligence claim for the physical injuries . . . in the same action." *Id.* at 162. If the claims are asserted in separate lawsuits, compulsory joinder under Rule 19 is required, as "the defendant would otherwise be exposed to 'a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.'" *Id.* at 162, n.29. Ultimately, the Court held that, "[a]s a matter of sound administration and fairness . . . where the claim for the physical injuries has been concluded by judgment or settlement . . . no action for loss of consortium thereafter instituted arising from the same incident will be allowed, even if that action would not be otherwise

barred by [the statute of] limitations.” *Id.* at 167. *See also Ferriter*, 381 Mass. at 516, n.12 (applying *Diaz*’s reasoning to separate claims by spouse and child for loss of consortium).

In this case, the manifest unfairness of Plaintiff’s belated assertion of an intent to pursue loss of consortium claims on behalf of his minor children warrants preclusion of such claims. As set forth in *Diaz*, Plaintiff’s children should have been joined under Rule 19 so that Plaintiff’s claim for negligence and their claims for loss of consortium could be tried in a single action. By waiting until this late juncture to raise the loss of consortium claims, Plaintiff has unfairly deprived Defendant of any meaningful opportunity to conduct discovery into the damages claims of Plaintiff’s children. Additionally, while the statute of limitations on Plaintiff’s children’s claims would not run until three years after they reach the age of majority, *see* G.L. c. 260, § 7, the SJC in *Diaz* held that separate, subsequent actions for loss of consortium arising from the same incident may not be commenced after resolution of the primary negligence claim, regardless of their timeliness under the statute of limitations. Accordingly, the Court should preclude Plaintiff and his counsel from asserting claims for loss of consortium on behalf of Plaintiff’s minor children.

**B. If Permitted, the Loss of Consortium Claims Should be Asserted in This Action**

Alternatively, if the Court is inclined to allow Plaintiff’s children to pursue their loss of consortium claims, the Court should order Plaintiff to assert such claims in the instant action. Asserting the claims in the instant action would serve the judicial economy as it would obviate the need for a separate trial involving the same parties, the same counsel and the same incident. Plaintiff’s counsel’s recent letter contemplates a subsequent action filed on behalf of Plaintiff’s minor children, contingent upon a favorable verdict in the current trial. The second action would involve further discovery, as well as a jury trial on the merits regarding, at minimum, the elements of causation and damages. Plaintiff’s counsel’s proposal also ignores the practical realities of a



separate action, which would inevitably require the empanelment of 14 new jurors, a detailed pre-charge and jury instructions, as well as multiple days of the Court's time for presentation of evidence and deliberation. The more pragmatic approach would be to hold a single trial in which one jury serves as the trier of fact on all claims arising out of the subject accident.

Finally, from a public policy standpoint, allowing the loss of consortium claims to proceed in a separate, subsequent action as Plaintiff's counsel intends would set a precedent for segmented litigation whereby plaintiffs could bring successive actions on behalf of injured parties and their spouses and children in order to have multiple trial opportunities against potentially liable parties and compound their aggregate recovery. Such a precedent would tip the scales against defendants, who would be forced to litigate and incur the defense costs associated with multiple iterations of damages claims arising from singular incidents. Likewise, it would waste judicial resources on actions that have been bifurcated and trifurcated, ad infinitum. As such, if Plaintiff's minor children are permitted to assert their loss of consortium claims, the Court should order that claims be asserted alongside Plaintiff's negligence claim in the instant action.

### **III. CONCLUSION**

WHEREFORE, and for the foregoing reasons, Defendant respectfully requests that the Court issue an order:

1. Precluding Plaintiff and his counsel from asserting claims for loss of consortium on behalf of Plaintiff's minor children related to the subject accident; or
2. In the alternative, instructing Plaintiff that any claims for loss of consortium on behalf of his minor children must either be asserted in the instant action or otherwise deemed waived.

THE DEFENDANT,  
DRAPER PROPERTIES, INC.,  
BY ITS ATTORNEYS,

DATED: 10/24/19



Mark W. Shaughnessy, Esq. (BBO# 567839)  
Email: [mshaughnessy@boyleshaughnessy.com](mailto:mshaughnessy@boyleshaughnessy.com)  
Matthew H. Greene, Esq. (BBO# 673947)  
Email: [mgreene@boyleshaughnessy.com](mailto:mgreene@boyleshaughnessy.com)  
Boyle | Shaughnessy Law PC  
695 Atlantic Avenue, 11<sup>th</sup> Floor  
Boston, MA 02111  
Phone: (617) 451-2000  
Fax: (617) 451-5775

**CERTIFICATE OF SERVICE**

~~Pursuant to Mass. R. Civ. P. 5(a) and/or Sup. Ct. R. 9A~~, I, the undersigned, do hereby certify that a copy of the foregoing document has been served via email and/or first-class mail postage prepaid on all parties or their representatives in this action as listed below this 24<sup>th</sup> day of Oct, 2019:

***Counsel for Plaintiff, Lucas Vicuna***

Richard J. Sullivan, Esq.  
Thomas P. Kelley, Esq.  
Sullivan & Sullivan, LLP  
83 Walnut Street  
Wellesley, MA 02481

AND

Owen R. O'Neill, Esq.  
Ryan E. Toombs, Esq.  
Owen O'Neill Law Group, LLC  
600 Chapman Street, Suite 4  
Canton, MA 02021



☐ Mark W. Shaughnessy, Esq. (BBO# 567839)  
☒ Matthew H. Greene, Esq. (BBO# 673947)  
***Counsel for Defendant, Draper Properties, Inc.***

# Exhibit 1

**OWEN O'NEILL LAW GROUP, LLC**

600 Chapman Street, Suite 4  
Canton, MA 02021

Owen R. O'Neill  
[owen@oolawgroup.com](mailto:owen@oolawgroup.com)

Telephone (339) 502-8900  
Fax 1+ (339) 545-0562

*\*Also Admitted in NY*

Ryan E. Toombs\*  
[ryan@oolawgroup.com](mailto:ryan@oolawgroup.com)

October 22, 2019

**VIA EMAIL AND FIRST CLASS MAIL**

Matthew H. Greene, Esq.  
BOYLE SHAUGHNESSY LAW, P.C.  
695 Atlantic Avenue, 11<sup>th</sup> Floor  
Boston, MA 02111

**CERTIFIED MAIL**

**RETURN RECEIPT REQUESTED**  
**NO. 7018 1130 0001 3554 2036**

Kristin L. Draper, Vice President  
DRAPER PROPERTIES, INC.  
28 Draper Lane  
Canton, MA 02021

**Re: Written Notice of Loss of Consortium Claims of Juan Ernesto Vicuna (DOB: 4/30/06) and Joshua Daniel Vicuna (DOB: 4/13/13) arising out of Lucas Vicuna's fall off of roof at 28 Draper Lane on 2/18/15**

Dear Attorney Greene and Ms. Draper:

As you know, I am legal counsel to Lucas Vicuna in connection with the life-altering personal injuries he sustained as a result of his 30-foot fall while performing snow removal work on a roof at the commercial property at 28 Draper Lane, Canton, MA back on February 18, 2015. Mr. Vicuna's negligence lawsuit against the owner and manager of that commercial property, Draper Properties, Inc., is going to trial in Norfolk County Superior Court on November 12, 2019.

In addition to serving as Lucas Vicuna's attorney, I am also legal counsel to his two young sons, Juan Ernesto Vicuna (now age 13) and Joshua Daniel Vicuna (now age 6) in connection with their continuing loss of their father's companionship and society as a direct result of Draper Properties, Inc.'s negligent failure to provide their father with a safe area to work while removing snow off of the roof of the 28 Draper Lane facility on February 18, 2015. Both Juan (then age 9) and Joshua (then age 20 months) have substantial loss of consortium claims due to the permanent brain and left arm injuries sustained by their father, then just age 29 -- injuries which have had a profound impact on their father-son relationship(s) and which are sure to affect these two boys for

Matthew H. Greene, Esq.  
Kristin L. Draper, Vice President  
October 22, 2019  
Page 2

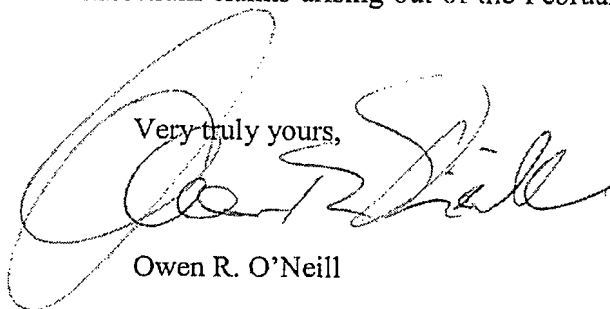
the rest of their lives. Based on the nature of their father's injuries – as confirmed by his medical records -- I believe that these two loss of consortium claims have a jury verdict value well in excess of \$1 million.

The purpose of this letter to place Draper Properties, Inc. and its liability insurers on written notice of my intention to pursue loss of consortium claims on behalf of Lucas Vicuna's two sons. Under well-settled Massachusetts law, the defense of comparative negligence does not apply to a loss of consortium claim. Moreover (and perhaps more pertinent to this situation), any finding of negligence against Draper Properties, Inc. in Lucas Vicuna's personal injury lawsuit will be legally binding on it in the loss of consortium action to be filed on behalf of his two minor sons against Draper Properties, Inc. ("A loss of consortium claim is an independent claim in Massachusetts. Consequently, the contributory negligence of the plaintiff, which will reduce his or her own recoverable damages, will not reduce any jury award for loss of consortium or parental society. Further, a plaintiff is not barred from recovering from a negligent tortfeasor the full amount of his or her damages for loss of consortium or parental society, even if the jury finds that his or her spouse of parent was more than 50 percent at fault." Morgan v. Lalumiere, 22 Mass.App.Ct. 262, 265 (1986); Feltch v. Gen. Rental. Co., 383 Mass. 603, 606-609 (1981)).

I would respectfully request that Draper Properties, Inc. notify all of its involved liability insurers, including, but not limited to, Massachusetts Bay Insurance Co. (Policy No. ZDN 90002055-04) and Hanover Insurance Company (Policy No. UHN8968211-05), of Juan Ernesto Vicuna's and Joshua Daniel Vicuna's loss of consortium claims arising out of the February 18, 2015 accident at its Canton, MA plant.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Owen R. O'Neill", is written over a large, faint, circular scribble.

Owen R. O'Neill

ORO/em

# Exhibit 2

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT (DEDHAM)  
C.A. No.: 1682CV01105

LUCAS VICUNA )  
Plaintiff )  
 )  
v. )  
 )  
DRAPER PROPERTIES, INC. )  
Defendant )

---

PLAINTIFF, LUCAS VICUNA'S ANSWERS TO DEFENDANT'S INTERROGATORIES

---

INTERROGATORIES

1. Please state your name, residential address, business address, date of birth, occupation and social security number.

ANSWER NO. 1

Lucas Vicuna; DOB: 2/23/1985; 117 West Street, Milford, MA 01757. I am currently unable to work due to injuries I suffered in a work-related fall at 28 Draper Lane, Canton, Massachusetts on February 18, 2015 while working as an employee of MV Construction, Inc.; I do not have a social security number.

2. Please describe in detail all the injuries sustained by you as a result of the accident alleged in the Complaint.

ANSWER NO. 2

Due to the serious head injuries I sustained in my work-related fall, I have no memory of the events that occurred from January until May of 2015. However, upon information and belief, it is my understanding that I fell about 35-45 feet from the roof and sustained life-threatening injuries which left me in a coma for several months. I suffered a severe head injury which required a few surgeries, including one called a "craniectomy," to remove part of my skull to alleviate swelling. I have a very noticeable deformity on the left side of my head from these surgeries, and I continue to experience headaches. I have also had three operations on my left elbow, and continue to experience severe pain and loss of movement in my left arm, elbow, and hand.

3. If you received medical treatment for the alleged injuries, please state:

- a. the name and address of any hospital in which you were treated, whether the treatment was as an in-patient or out-patient and the dates of all such treatment;
- b. the name and address of each doctor who treated, attended or examined you for the alleged injuries;
- c. the number and nature of each treatment by each said doctor and hospital, setting forth the date and place of each treatment; and
- d. an itemized account of all expenses incurred for the above-referenced treatments.

**ANSWER NO. 3(a-d)**

It is my understanding that I have received treatment from the following medical providers as a result of my February 18, 2015 work-related accident:

1. Brigham and Women's Hospital/Faulkner Hospital
2. Massachusetts General Hospital
3. Spaulding Rehabilitation Hospital
4. Milford Regional Medical Center
5. UMass Memorial Medical Center
6. Lahey Clinic
7. Momentum Physical Therapy
8. Canton Fire Department

For the details of my treatment, please see the medical records which were previously produced in discovery by my attorneys. I am still treating for my injuries and will supplement this response by providing additional medical records and bills as those documents are received by my attorneys.

4. If you were confined to bed or to the house as a result of the accident alleged in your Complaint, please state as nearly as you can the dates between which you were so confined.

**ANSWER NO. 4**

I have no memory from January of 2015 (about a month before I was injured) until May of 2015. However, upon information and belief, I was confined to a bed in the hospital from February 18, 2015 through April 2015. After being discharged from the hospital, I remained almost exclusively homebound until July of 2015.

5. If you claim that as a result of the accident alleged in your Complaint you received injuries that prevented you from following your usual occupation, kindly state:
  - a. what your occupation was at the time of the accident;
  - b. the name of your employer;



- c. the average weekly earnings, salary or income you received from your work; and
- d. the date on which you first resumed the duties of your occupation after the accident alleged in the Complaint.

**ANSWER NO. 5(a-d)**

Prior to my injury I worked as a roofer/laborer for MV Construction. I earned an average of about \$1,356.52 each week. I have not recovered from my injuries and have not been able to return to work since February 18, 2015.

- 6. If you have recovered from the injuries sustained as a result of the accident alleged in your Complaint, please state the approximate date by which recovery was complete, or, if you have not recovered, please state in exactly what manner you are now affected by said injuries.

**ANSWER NO. 6**

I have not recovered from my injuries, and continue to experience headaches, as well as severe pain and limited use of my left arm and hand.

- 7. Please give an itemized statement of all financial loss or expense incurred by you or on your behalf as a result of the alleged accident, including medical expenses, lost wages, earnings or business, and property damage loss, if any.

**ANSWER NO. 7**

Upon information and belief, it is my understanding that as a result of the life-threatening injuries I suffered in February 2015, I have incurred medical bills totaling at least \$831,902.79 to date. For the details of my medical expenses, please see the medical bills and spreadsheet which have been previously provided by my attorneys.

- 8. If you have ever sustained an injury to, or suffered from a medical condition affecting, the part(s) of your body you allege was/were injured or affected as a result of this accident, please state:
  - a. the names and addresses of any hospital or medical facility in which you were treated for same and the date(s) of all such treatment;
  - b. the names and addresses of each doctor who treated, attended, diagnosed, or examined you for same; and
  - c. the nature of the injury and/or medical condition and treatment for same.

**ANSWER NO. 8(a-c)**

The plaintiff objects to this interrogatory to the extent that it is overly broad and unduly

burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, the plaintiff answers as follows:

Prior to the injuries I sustained on February 18, 2015 I had no medical conditions.

9. If, during the five years before the accident alleged in the Complaint, or, if since the date of the accident, your physical condition was affected by illnesses, operations, injuries or other accidents, please state full details of each.

**ANSWER NO. 9**

The plaintiff objects to this interrogatory to the extent that it is overly broad and unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, the plaintiff answers as follows:

Prior to the injuries I sustained on February 18, 2015 I had no other illnesses, operations, injuries or accidents.

10. If you have made any other claim or claims for personal injury or bodily injury against any person or corporation either before or since the date of the accident alleged in your Complaint, kindly state full details as to each such claim.

**ANSWER NO. 10**

Not applicable.

11. Please state when the alleged incident occurred, giving the date and time of day.

**ANSWER NO. 11**

Due to the serious head injuries I sustained in my work-related fall, I have no memory of the events that occurred on February 18, 2015. Upon information and belief, the accident occurred on the morning of February 18, 2015, sometime before 10:50 a.m.

12. Please describe the weather conditions at the time of the alleged incident and during the twenty-four (24) hours immediately preceding the alleged incident.

**ANSWER NO. 12**

Due to the serious head injuries I sustained in my work-related fall, I have no memory from approximately January 2015 through May 2015. Upon information and belief, it was a cold winter day and there had not been any substantial snow fall during the previous 24 hours.

13. Please describe in exact detail how the alleged incident occurred, setting forth what you saw, what you did and what happened to you in the order in which the events took place.

ANSWER NO. 13

Due to the serious head injuries I sustained in my work-related fall, I have no memory of the events that occurred on February 18, 2015. Upon information and belief, I fell approximately 30 feet from the roof of the 28 Draper Lane property as a result of the dangerous buildup of snow which had accumulated on the roof and landed on the frozen ground below.

14. Please state the names and addresses of all persons having knowledge of discoverable matters, including but not limited to any and all witnesses to the accident, and identify the subject matter(s) on which each has knowledge.

ANSWER NO. 14

Due to the serious head injuries I sustained in my work-related fall, I have no memory of the events that occurred on February 18, 2015, and cannot recall who, if any, witnesses were at the accident scene. Please refer to my medical records for the medical professionals who have provided treatment and are familiar with my injuries. Upon information and belief, I believe that the following individuals may have some knowledge about the circumstances surrounding my fall:

Dave Loving, Plant Engineer, Draper Properties  
Maria Vicuna  
Alfonso Castro  
Hamilton Molina  
David Molina  
Juan Jara  
Aricelli Arguello

15. Please state all facts upon which you base the allegations in the Complaint that the defendant was negligent.

ANSWER NO. 15

The plaintiff objects to this interrogatory to the extent that it calls for legal conclusions and expert opinions. Without waiving these objections, the plaintiff answers as follows:

Upon information and belief, it is my understanding that Draper Properties, Inc., as the owner and entity in control of the 28 Draper Lane property, owed me a duty of reasonable care, and breached that duty by negligently causing or permitting a large buildup of snow which hung over the roof by several feet; failing to warn me of the dangerous condition created by the large buildup of snow, and by failing to train and instruct me on how to safely perform snow removal work, including the removal of a large buildup of snow.

16. If you claim the alleged incident occurred as the result of the presence of snow and/or ice, or some other defect or defective condition, please state:
- a. a complete and detailed description of the snow and/or ice, defect or defective condition, giving approximate measurements of same;
  - b. specifically where, with reference to identifiable objects, the alleged snow and/or ice, defect or defective condition was located, giving approximate measurements from such objects;
  - c. whether you observed the snow and/or ice or alleged defect or defective condition prior to the occurrence of the alleged incident, and if so when, giving date(s) and time(s) of day;
  - d. how long, in units of time, the snow and/or ice or alleged defect or defective condition had existed prior to the occurrence of the alleged incident; and
  - e. exactly the manner in which the snow and/or ice or alleged defect or defective condition was involved in the alleged incident.

**ANSWER NO. 16(a-e)**

Due to the serious head injuries I sustained in my work-related fall, I have no memory of the events that occurred on February 18, 2015. However, upon information and belief, it is my understanding that my accident occurred as a result of falling from a dangerous buildup of snow which accumulated on the roof of the 28 Draper Lane property.

17. Did you or someone on your behalf give notice of the occurrence of the incident alleged in the Complaint and, if so, please state:
- a. the names and addresses of the persons to whom said notice was given;
  - b. the date(s) on which said notice was given;
  - c. whether said notice was oral or written; and
  - d. in exact detail the notice which was given. If the notice was written, please attach a copy of the notice to your answers.

**ANSWER NO. 17(a-d)**

Due to the serious head injuries I sustained in my work-related fall, I have no memory of the events that occurred on February 18, 2015.

18. Please state fully and in complete detail the substance of any and all oral communication and/or conversations you had with the defendant prior to or following the incident.

**ANSWER NO. 18**

The plaintiff objects to this interrogatory to the extent that it is overly broad and unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, the plaintiff answers as follows:

Due to the serious head injuries I sustained in my work-related fall, I have no memory of the events that occurred between January and May of 2015. I do not recall any conversations with the defendant prior to or following the incident.

19. If you allege that your alleged injuries resulted from the defendant's breach of any state or local building or other codes and/or regulations, or any provisions of OSHA, provide full details of each such code, regulation and/or provision.

ANSWER NO. 19

The plaintiff objects this interrogatory on the grounds that it calls for legal conclusions and expert opinions. Without waiving these objections, the plaintiff answers as follows:

I am not personally aware of the specific state or local building regulations that were violated by the defendant. However, it is my understanding that the defendant did violate a number of safety regulations issued by OSHA and the Commonwealth of Massachusetts. I expect that, if this case goes to trial, my attorneys will introduce evidence of those violations of safety regulations into evidence.

20. With respect to each expert witness whom you expect to be called for testimony on your behalf at trial, please state:
- a. The name and address of each person whom you expect to call as an expert witness on your behalf in the above matter, including as to each person the nature of his or her specialization;
  - b. The substance of facts and opinions to which each such expert is expected to testify; and
  - c. A summary of the grounds for each opinion of each expert.

ANSWER NO. 20(a-c)

The plaintiff objects to this interrogatory on the grounds that it exceeds the scope of permissible expert discovery pursuant to Mass.R.Civ.P. 26(b)(4). Without waiving these objections, the plaintiff responds as follows:

No decision has yet been made by my attorneys as to what experts, if any, will be called to testify on my behalf at trial.

21. Please state in full the name, address, and substance of the expected testimony of each

and every person whom you expect to call as a fact witness on your behalf at the trial of the above matter.

**ANSWER NO. 21**

The plaintiff objects to this interrogatory on the grounds that it exceeds the scope of permissible discovery and calls for the discovery of the plaintiff's attorneys' trial strategy and mental impressions. Responding further, the plaintiff states that no decision has yet been made by the plaintiff's attorneys regarding evidence to be offered at trial.

22. Please identify any other claim or lawsuit made against any other person or corporation (including claims for insurance benefits or workers' compensation benefits) as a result of the incident alleged in the Complaint.

**ANSWER NO. 22**

I am receiving workers' compensation benefits from AIM Insurance (Claim No.: 100-009844437) as a result of the accident.

23. If you have been convicted of any felonies within the last ten years, or any misdemeanors within the last five years, please state with respect to each such conviction the date, name and address of the court, docket number and the type of felony or misdemeanor.

**ANSWER NO. 23**

Not applicable

24. Please state whether you consumed any alcoholic beverages, narcotics and/or prescription drugs within 24 hours preceding the happening of the accident, and if so, please set forth:
- a. the name of each such beverage, narcotic and/or prescription drug you consumed;
  - b. the quantity of each such beverage, narcotic and/or prescription drug;
  - c. the time and location you consumed each such beverage, narcotic and/or prescription drug;
  - d. name and address of each and every witness to such consumption; and
  - e. as to each such prescription drug, the reasons for which the drug was prescribed and the name, address and phone number of the physician who wrote the prescription.

**ANSWER NO. 24(a-e)**

Not applicable.

25. If, as a result of the occurrences alleged in the Complaint, you are seeking to recover for

any economic loss, including but not limited to, costs or expenses of hospitals, doctors, medicines, medical care, custodial care or rehabilitation services and/or loss of earnings, then please set forth in detail whether any such loss has been or will be replaced, compensated or indemnified or paid for directly by:

- a. Social Security and, if so, please state the amount so compensated, replaced, indemnified or paid directly, and the claim number, if applicable;
- b. Any state or federal disability insurance/program or Worker's Compensation Act; and if so, please identify the disability insurance/program or Worker's Compensation Act and state the amount replaced, compensated or indemnified or paid directly and the plaintiff's Medicare Health Insurance Claim Number ("HICN"), if applicable;
- c. Any insurance program that provides health benefits and, if so, identify the insurance, the insurance company and/or the program and the amount replaced, compensated or indemnified or paid directly, and the plaintiff's Medicare Health Insurance Claim Number ("HICN") or other claim number, if applicable;
- d. Any form of income disability coverage and, if so, please identify the disability coverage and state the amount so replaced, compensated or indemnified or paid directly and the plaintiff's claim number, if applicable;
- e. Any contract or agreement of any group, organization, partnership or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental or other health care services and, if so, describe the contract or agreement and identify the group, organization, partnership or corporation and the amount, as well as the plaintiff's claim number, if applicable;
- f. Any contract or agreement to continue to pay, in whole or in part, the plaintiff's wages or income and, if so, describe the contract or agreement and the amount;
- g. Medicare, Medicaid, Social Security Disability Insurance, state-sponsored medical insurance; and if so, please state the amounts so replaced, compensated, indemnified or paid directly and the plaintiff's Medicare Health Insurance Claim Number ("HICN"), if applicable; and
- h. Any other collateral source(s) of benefits whatsoever and, if so, describe each source and the amount.

**ANSWER NO. 25(a-h)**

**It is my understanding that as a result of the life-threatening injuries I suffered in February 2015, I have incurred medical bills totaling approximately \$827,967.26 to date. For the complete details of my medical expenses, please see the medical bills and spreadsheet which have been previously provided by my attorneys. In addition, I am receiving workers' compensation benefits from AIM Insurance (Claim No.: 100-**

009844437) as a result of the accident.

26. If as a result of the occurrences alleged in the Complaint, you suffered any economic loss for which any present or potential lien has been or will be made with regard to that loss, please state:
- a. The name and address of any such lien holder;
  - b. The date upon which the plaintiff learned of such lien;
  - c. The amount of any such lien; and
  - d. The Medicaid Health Insurance Claim Number, or other claim number, if applicable.

**ANSWER NO. 26(a-d)**

As a result of the injuries which I suffered in my work-related accident on February 18, 2015, I have received workers' compensation benefits from AIM Mutual Insurance Company, P.O. Box 4070, Burlington, MA 01803. It is my understanding that AIM Mutual has paid at least \$406,703.87 in benefits to date, with a breakdown of \$42,263.59 in indemnity payments and \$364,440.28 in medical expenses. My workers' compensation case is still open.


27. Please identify all exhibits and/or other documents that you intend to use at the time of trial or during depositions in this matter.

**ANSWER NO. 27**

The plaintiff objects to this interrogatory on the grounds that it exceeds the scope of permissible discovery and calls for the discovery of the plaintiff's attorneys' trial strategy and mental impressions. Responding further, the plaintiff states that no decision has yet been made by the plaintiff's attorneys regarding evidence to be offered at trial.

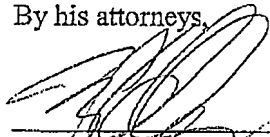


SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 21 DAY  
OF DECEMBER, 2016.

  
Lucas Vicuna

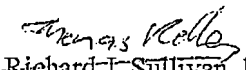
**AS TO OBJECTIONS:**

The plaintiff,  
By his attorneys,


  
Richard J. Sullivan, BBO#554085  
Thomas P. Kelley, BBO#682084  
SULLIVAN & SULLIVAN, LLP  
83 Walnut Street, Suite 100  
Wellesley, MA 02481  
Tel: 781-263-9400

Owen R. O'Neill, BBO#552519  
Ryan Toombs, BBO#679272  
OWEN O'NEILL LAW GROUP, LLC  
600 Chapman Street, Suite 4  
Canton, MA 02021  
Tel: 339-502-8900

**CERTIFICATE OF SERVICE**

  
I, Richard J. Sullivan, hereby certify that the above document has been served upon all  
counsel or record, via email and first class mail, this 21 day of December, 2016, as follows:

Mark W. Shaughnessy, Esq.  
Christopher G. Perillo, Esq.  
BOYLE, SHAUGHNESSY & CAMPO, P.C.  
695 Atlantic Avenue, 11<sup>th</sup> Floor  
Boston, MA 02111

  
Thomas P. Kelley, Esq.

# Exhibit 6

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Volume: I  
Pages: 133  
Exhibits: --

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT DEPARTMENT  
DEDHAM DIVISION

\* \* \* \* \*  
LUCAS VICUNA, \*  
Plaintiff, \*  
-vs- \* DOCKET NO. 1682CV01105  
\* COURTROOM #10  
DRAPER PROPERTIES, INC., \*  
Defendant. \*  
\* \* \* \* \*

FINAL TRIAL CONFERENCE  
BEFORE THE HONORABLE JUDGE ROSALIND H. MILLER

APPEARANCES:

ATTORNEYS FOR PLAINTIFF, LUCAS VICUNA:  
BY: Owen Roe O'Neill, Esq.  
Owen O'Neill Law Group  
600 Chapman Street, Suite 4  
Canton, MA 02021

BY: Richard Sullivan, Esq.  
Thomas P. Kelley  
Sullivan & Sullivan, LLP  
83 Walnut Street  
Wellesley Hills, MA 02481

ATTORNEYS FOR DEFENDANT, DRAPER PROPERTIES, INC.:  
BY: Mark William Shaughnessy, Esq.  
Matthew H. Greene, Esq.  
Boyle and Shaughnessy Law PC  
695 Atlantic Avenue, 11th Floor  
Boston, MA 02111

Dedham, Massachusetts  
Thursday, November 7, 2019

Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

## I N D E X

	PAGE
FINAL TRIAL CONFERENCE	4
MOTIONS IN LIMINE	4
Motion to Compel Production of Materials Relied on by Dr. Vega (#28.0)	6
- Denied	13
Motion to Preclude Loss of Consortium Claim (#27.0)	14
- Denied	19
Motion to Preclude Speculation Regarding Details of Fall (#30.0)	19
- Allowed	20
Motion in Limine to Admit Evidence re Range of Payments (#30.1)	21
- Allowed	23
Motion to require Plaintiff to Give 24-hour Notice Prior to Calling any witnesses at trial (#30.3)	24
- Allowed	24
Motion to Preclude Any Evidence or Argument Regarding Insurance Maintained by Defendant (#30.4)	24
- Allowed	24
Motion to Introduce Evidence or Argument in Event Plaintiff affirmatively pleads poverty due to accident (#30.5)	24
- Allowed	24
Motion to preclude introduction of evidence or argument re lost wages and lost earnings capacity (#30.6)	26
- Allowed	26
Motion to preclude introduction of evidence or argument re Defendant controlled means and methods of Plaintiff's work (#30.7)	26
- Denied	26

## I N D E X, continued

	PAGE
Motion to preclude Defendant from commenting on Plaintiff's Immigration Status or from using the term "Illegal Alien" (#33.0)	55
- Allowed	26
Motion to Preclude Defendants from Offering Any Evidence of Collateral Source Income (Worker's Compensation Benefits) (#33.4)	56
- Allowed	56
Motion to Preclude Defendants from Mentioning in Open, Closing or Cross Examination that Plaintiff's Expert did not inspect the subject premises (#33.6)	56
- Allowed	57
Motion to Preclude Defendant from Offering Evidence of, or Referring to, Laypersons' Opinions Concerning Proper Fall Protection Procedures (#33.8)	57
- Allowed	64
Motion to Preclude Defendant from Offering Evidence of, or Referring to irrelevant prejudicial historical information regarding Draper Brothers Company and Draper Knitting Company (#34.0)	64
- Denied	66

1 THE COURT: Moving on to Number 27. This is the loss  
2 of consortium claim. This is a little late in the day,  
3 but let me find out.

4 So let me ask counsel for the plaintiff, do you have  
5 a plan to bring a lawsuit consortium claim?

6 MR. O'NEILL: Possibly, Your Honor. Absolutely.  
7 For --

8 THE COURT: Why didn't you bring it in the first  
9 place?

10 MR. O'NEILL: Because of the time we filed this  
11 lawsuit, Judge, Juan was 9 years old, and Danny, Joshua,  
12 was 20 months old, and under the law, Your Honor, they're  
13 minors. They have independent causes of action against  
14 Draper Properties.

15 And, Your Honor, we're only going to bring those  
16 claims if we prevail on the issue of negligence in this  
17 case.

18 THE COURT: Okay.

19 MR. O'NEILL: And they're entitled to do it, Judge.

20 THE COURT: I don't think you answered my question  
21 about why you didn't bring it with the rest of the case.

22 MR. O'NEILL: Your Honor, I quite often times don't  
23 bring consortium claims. I think it takes away in part  
24 from the real issue in this case, which is the 29-year-old  
25 worker who has brain injuries. You know, we made a -- we

1 made a conscious decision not to do that.

2 But, Your Honor, that -- so that's the answer to your  
3 question. We made a strategic decision. I don't always  
4 bring consortium claims.

5 Judge, if I was presented with a rule, if there was a  
6 rule of law in Massachusetts that required me to bring  
7 those claims, I would have brought it, because I try to  
8 follow the rules.

9 Here, there is no rule. In fact, there's a statute  
10 that says minor's claims can be brought from three years  
11 after their 18th birthday. And the case law that my  
12 brother relies on just doesn't apply. He's just not right  
13 on the law.

14 THE COURT: I'm just asking you a practical question.

15 MR. O'NEILL: Yeah, no, and I'm -- I'm sorry, Your  
16 Honor, I'm getting ahead of myself. But there really --

17 THE COURT: That's my reason for the question.

18 MR. O'NEILL: Listen, here's what happened, Judge --

19 THE COURT: Not how they ruled. It's more --

20 MR. O'NEILL: -- you probably saw in the motions what  
21 happened.

22 I wrote a letter a couple of weeks ago, pretrial  
23 stuff, trying to move things in this case, and I indicated  
24 that I'm representing the children. I'm well aware of the  
25 law governing lawsuit consortium, and I just put them on

1 notice of a claim.

2 I didn't seek to amend to add these young children as  
3 -- I don't want these children, as far as this case, in  
4 front of this jury next week. The little boy is 6 years  
5 old. How is he going to -- his -- his claim hasn't even  
6 ripened yet, Your Honor. He has the right to bring that  
7 claim when he's 17 years old, and he can talk about the  
8 fact that his father couldn't play soccer or wiffle ball  
9 with him, or couldn't do certain things.

10 He can't testify. He's the cutest little guy in the  
11 world. I actually wouldn't mind seeing him in front of a  
12 jury, but in fairness to him, and as their legal counsel,  
13 I felt that the right thing to do in this case was not to  
14 bring those children's claims.

15 But again, Judge, what they're looking for is rather  
16 draconian. They're looking to bar the claims because they  
17 weren't brought. There's no law that supports that. I'm  
18 very comfortable with that. It's cited in my case.

19 The *Ferriter* case, it doesn't apply.

20 So I would respectfully ask the Court to deny their  
21 motion seeking to bar these two little boys' claims and to  
22 keep those little boys out of this case. And if they get  
23 a defense verdict, they're derivative claims, so they can  
24 bring them down the road. Judicial economy will be --

25 THE COURT: Well, judicial economy --



1 MR. O'NEILL: -- well served.

2 THE COURT: -- you should have done it all in the  
3 first thing.

4 MR. O'NEILL: But, Your Honor, I mean, here's the  
5 thing --

6 THE COURT: We're not going to argue about it too  
7 much.

8 MR. O'NEILL: Okay. Okay.

9 THE COURT: Counsel, what do you say?

10 MR. GREENE: I --

11 THE COURT: What authority is there for me barring  
12 the claim when they're not -- I think this a -- this is a  
13 issue that's going to have to be decided long after I'm  
14 retired from the bench, if you get a verdict.

15 MR. GREENE: I think the foundation of Rule 19 and  
16 *Diaz v. Eli Lilly* really addressed this. I think that  
17 *Diaz v. Eli Lilly* and *Ferriter* are both slightly  
18 differently situated because there was a spousal loss  
19 consortium claim, where there isn't here. But the fact  
20 that Mr. Vicuna has a common-law wife who can't assert her  
21 common-law -- or can't assert a consortium claim on her  
22 own basis, I don't think, changes the fundamental legal  
23 principles.

24 First of all, the ripeness argument is misplaced.  
25 Ripeness is clearly a separate legal doctrine which is

1 being confused with the statute of limitations here.

2 These claims are ripe, because they're aware of the loss.

3 The very fact that they have legal representation who has  
4 asserted the indication that he is going to bring these  
5 claims means that they're ripe.

6 The fact that they could bring them technically later  
7 because of the statute of limitations and their minority  
8 status has nothing to do with ripeness. They're ripe  
9 because Attorney O'Neill sent us a letter saying, I intend  
10 to do this. They became ripe once they were aware that  
11 there was some harm to the children on behalf of their  
12 next friend.

13 And with regard to judicial economy. I understand  
14 that the arguments regarding Rule 19 and *Diaz v. Eli Lilly*  
15 are somewhat speculative, but this runs the risk of the  
16 fragmentation of all legal claims where you can  
17 essentially cherry pick the best damages arguments to  
18 bring to twin with your liability argument. Try that  
19 case, and then try to use collateral estoppel down the  
20 line to have every subsequent damages argument put before  
21 a different jury in a -- in an attempt to multiply  
22 verdicts.

23 This isn't simply an assessment of damages hearing  
24 that would be done after the fact. This would be a new  
25 trial on the issues of causation and damages. A new 14

1 jurors in those seats. A new trial judge taking up time  
2 for other matters that could be tried.

3 I think if the Court isn't or doesn't feel  
4 comfortable with barring these claims, at minimum they  
5 have to tell them, fine, you want these claims, you have a  
6 jury coming in on Tuesday, bring these claims now or  
7 forever hold your peace.

8 THE COURT: Okay. That's denied.

9 All right. Moving on.

10 MR. O'NEILL: Thank you, Your Honor.

11 THE COURT: Number 30. This is defendant's motion in  
12 limine to preclude speculation regarding details of the  
13 fall. And that one there was -- there's no opposition to  
14 that one, is there?

15 MR. GREENE: Correct, Your Honor.

16 MR. SHAUGHNESSY: There's not, Your Honor.

17 THE COURT: Okay. So let me just --

18 MR. O'NEILL: Oh, yeah, Your Honor, you've probably  
19 seen the papers. Lucas Vicuna has no memory of --

20 THE COURT: They've been -- they're not having a  
21 problem with that.

22 MR. O'NEILL: Yeah. Yeah. No, I just wanted to let  
23 you know that's why we're -- I mean, we're not going to  
24 allow him to testify at trial about something he doesn't  
25 remember, so.

# Exhibit 7

11/25/2019

"OFFICIAL"

53.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
No.1682CV01105

LUCAS VICUNA

vs.

DRAPER PRPERTIES, INC.

SPECIAL QUESTIONS JURY VERDICT

1. Was the Defendant, Draper Properties, Inc. negligent?( Based on duty as a property owner-Theory I)

YES X

NO \_\_\_\_\_

(If your answer to Question 1 is "Yes," please proceed to Question 2. If your answer to Question 1 is "No," please proceed to Question 3.)

2. Was the negligence, if any, of the Defendant, Draper Properties, Inc., a substantial contributing factor in causing injury or harm to the Plaintiff, Lucas Vicuna?( Based on duty as a property owner-Theory I)

YES X

NO \_\_\_\_\_

11/25/19 RECEIVED & FILED  
CLERK OF THE COURTS  
NORFOLK COUNTY

(If your answer to Question 2 is "Yes," please proceed to Question 3. If your answer to Question 2 is "No," please proceed to Question 3.)

3. Did Draper Properties, Inc. retain control over the work of MV Construction?( Based on retained control- Theory II )

YES \_\_\_\_\_ NO       X      

(If your answer to Question 3 is "Yes," please proceed to Question 4. If your answer to Questions 1, 2 and 3 is "No," please STOP, sign the form below and let the Court Officer know that the jury has reached a verdict. If your answer to Question 3 is "No," but you answered Questions 1 and 2 "Yes," please proceed to Question 6.)

4. Did Draper Properties, Inc. breach its duty to exercise its supervisory control over MV Construction with reasonable care and is therefore negligent?( Based on retained control-Theory II )

YES \_\_\_\_\_ NO \_\_\_\_\_

(If your answer to Question 4 is "Yes," please proceed to Question 5. If your answer to Question 4 is "No," and you answered Questions 1, 2 "No," please STOP, sign the verdict slip and let the Court Officer know that the jury has reached a verdict. If your answer to Question 4 is "No," but you answered Questions 1 and 2 "Yes," please proceed to Question 6.)

5. Was the negligence of Draper Properties, Inc., if any, in its failure to use reasonable care in exercising its supervisory control over MV Construction, a substantial contributing factor in causing injury or harm to Lucas Vicuna? (Based on retained control-Theory II)

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question 5 is "Yes," please proceed to Question 6. If your answer to Question 5 is "No," and you answered Questions 1 and 2 "No," please STOP, sign the verdict slip and let the Court Officer know that the jury has reached a verdict. If your answer to Question 5 is "No," but you answered Questions 1 and 2 "Yes," please proceed to Question 6.

6. Was the Plaintiff, Lucas Vicuna, himself negligent?

YES           X           NO \_\_\_\_\_

(If your answer to Question 6 is "Yes," please proceed to Question 7. If your answer to Question 6 is "No," please continue to Question 9.

7. Was the negligence, if any, of the Plaintiff, Lucas Vicuna, a substantial contributing factor in causing his own injuries?

YES           X           NO \_\_\_\_\_

(If your answer to Question 7 is "Yes," please proceed to Question 8. If your answer to Question 7 is "No," please proceed to Question 9.)

8. What percentage of fault for the plaintiff's accident is attributable to:

A. The Defendant, Draper Properties, Inc. 30 %

B. The Plaintiff, Lucas Vicuna 70 %

(Total must equal 100%)

(Please proceed to Question 9.)

9. What amount of money do you award the Plaintiff, Lucas Vicuna, as full and fair compensation for his injuries?

Total Damages

(Amount in numbers) \$ \_\_\_\_\_

(Amount in words)

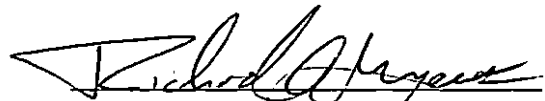
\_\_\_\_\_



Please STOP and sign the Special Questions form, as you have reached a verdict.

**I hereby certify that the foregoing are the answers of at least 5/6 of the members of the deliberating jury.**

---


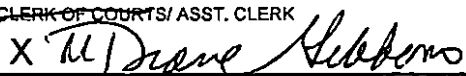
A handwritten signature in black ink, appearing to read "Richard A. Hayes", written over a horizontal line.

Foreperson of the Jury

Date: November<sup>25</sup>, 2019

# Exhibit 8

61.0

<b>AMENDED JUDGMENT ON JURY VERDICT</b>		<b>Trial Court of Massachusetts The Superior Court</b>	
DOCKET NUMBER <b>1682CV01105</b>		Walter F. Timilty, Clerk of Courts	
CASE NAME  Vicuna, Lucas vs. Draper Properties, Inc.		COURT NAME & ADDRESS Norfolk County Superior Court 650 High Street Dedham, MA 02026	
JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Draper Properties, Inc.			
JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S) Vicuna, Lucas			
<p>This action came on for a jury trial before the Court, Hon. Rosalind H Miller, presiding, the issues having been duly tried and the jury having rendered its verdict,</p> <p>It is <b>ORDERED AND ADJUDGED</b>:</p> <p>That the above named plaintiff(s) take nothing, that the action be dismissed on the merits, and that the defendant(s) named above will not recover statutory costs.</p> <p>—After a Trial before the Court and a Jury, the Honorable Rosalind H. Miller presiding and the Jury having returned a Verdict for the Defendant, WHEREFORE, it is ORDERED and ADJUDGED that that the Plaintiff Lucas Vicuna take nothing, that the action be Dismissed on the merits.</p> <p>CS</p> <div style="text-align: center;"><p>RECEIVED &amp; FILED 2019 DEC 24 AM 9:55 CLERK OF THE COURT'S NORFOLK COUNTY</p></div>			
DATE JUDGMENT ENTERED 12/24/2019		CLERK OF COURTS/ ASST. CLERK 	

# Exhibit 9

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-831

LUCAS VICUNA

vs.

DRAPER PROPERTIES, INC.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After heavy snowfall in the winter of 2015, Draper Properties, Inc., the owner of a business complex in Canton, hired roofing company MV Construction, Inc., to remove a large amount of snow that had accumulated on the flat roof of one of the complex's buildings. While on the job, Lucas Vicuna, an employee of MV Construction, fell from the roof and suffered serious injuries. He then brought the underlying action for negligence against Draper Properties. His essential theory at trial was that Draper Properties was negligent for failing to ensure that there was adequate fall protection on the roof.

A jury returned a special verdict in favor of Draper Properties, finding that Draper Properties was negligent, but that Vicuna was seventy percent comparatively negligent. An amended judgment entered for Draper Properties, and Vicuna

appeals, arguing that the trial judge erred by excluding evidence of certain regulations and publications issued by the Occupational Safety and Health Administration (OSHA). We affirm.

Discussion. Vicuna moved in limine for an order allowing him to offer evidence of the OSHA regulations governing fall protection, related sub-regulatory guidance, and the OSHA "multi-employer citation policy," which is intended to guide OSHA inspectors as to "when citations should and should not be issued to exposing, creating, correcting, and controlling employers" on a multi-employer worksite. Vicuna argued that these materials were relevant because they imposed on Draper Properties a duty to implement a safety plan "to make sure that one of the accepted forms of fall protection would be available for all workers who went on the roof." He further argued that Draper Properties' failure to implement a safety plan was a proximate cause of his injuries. After extended discussion with counsel for both parties, the judge denied the motion, concluding that the regulations were inapplicable because Vicuna was not Draper Properties' employee, that the multi-employer citation policy did not "set a standard of care" and applied only to "construction sites," and that the other materials were "advisory" and imposed no legal obligations.

We review the judge's ruling for an abuse of discretion, see N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 363 (2013), and we discern none for several reasons. First, although it is true that a regulatory violation can be considered as "some evidence of negligence," St. Germaine v. Pendergast, 411 Mass. 615, 620 (1992), Vicuna did not establish that the OSHA materials were relevant and admissible for that purpose. The case was tried on two theories of liability: that Draper Properties breached the duty of care applicable to property owners, and that it retained sufficient control over Vicuna's work to be liable for his injuries. In his motion Vicuna argued only that the OSHA materials were relevant to the first theory -- specifically, that "[t]he application of OSHA to Draper Properties helps establish what the particular standard of care was for this commercial building owner."

Vicuna fails to explain, however, how the OSHA materials were relevant to determining the standard of care that Draper Properties owed as a property owner under common law. See St. Germaine, 411 Mass. at 620 (extent of duty of care is question of common law). In fact, nowhere in his brief does Vicuna even mention the applicable common-law standard of care.<sup>1</sup> Instead,

---

<sup>1</sup> Under the common law, all property owners owe the same standard of care to lawful visitors, which is "a duty to 'act as a

Vicuna contends that the OSHA materials were relevant to show that Draper Properties had separate "obligations as an employer" and not "merely [as] a landowner." Likewise, Vicuna argued in his motion that the OSHA materials would show that Draper Properties had "duties as both the property owner under traditional tort law -- to behave reasonably to all lawful entrants upon its premises -- and as an employer engaged in commerce under the [Occupational Safety and Health] Act." But contrary to the premise of Vicuna's argument, safety regulations do not "create a new duty" for purposes of a negligence claim, nor do regulatory violations "constitute negligence per se." Id. See Juliano v. Simpson, 461 Mass. 527, 532 (2012). The judge was therefore within her discretion to exclude the OSHA materials, which could well have confused the jury. See Lyon v. Morpew, 424 Mass. 828, 834 (1997) ("We have never recognized a

---

reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.'" Papadopoulos v. Target Corp. 2, 457 Mass. 368, 383 (2010), quoting Young v. Garwacki, 380 Mass. 162, 169 (1980). With regard to open and obvious dangers -- such as the lack of fall protection on Draper Properties' roof -- property owners have a duty to remedy the dangerous condition only if they "can and should anticipate that the dangerous condition will cause physical harm to the [lawful visitor] notwithstanding its known or obvious danger." Papadopoulos, supra at 379, quoting Soederberg v. Concord Greene Condominium Ass'n, 76 Mass. App. Ct. 333, 338 (2010).



common law duty of building owners to place or maintain fall protection safety devices on roofs").

The judge was also within her discretion to conclude that the OSHA materials were not, in any event, applicable to the facts of this case because Vicuna was not Draper Properties' employee and did not perform the work on a construction site. The judge's ruling is consistent with Federal court decisions addressing the scope of the OSHA multi-employer doctrine. See Universal Constr. Co. v. Occupational Safety Health Review Commission, 182 F.3d 726, 730 (10th Cir. 1999) ("The multi-employer doctrine is particularly applicable to multi-employer construction worksites, and in fact has been limited in application to that context"). The doctrine has the remedial goal of ensuring safety on joint construction sites, in recognition of the fact that "[t]he nature of construction requires that subcontractors work in close proximity with one another and with the general contractor." Id. See Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 735 (5th Cir. 2018) (rational for OSHA to apply multi-employer doctrine to "place of employment like a construction worksite, populated by subcontractors, sub-subcontractors, and their employees performing various [and often overlapping] tasks"); United States v. MYR Group, Inc., 361 F.3d 364, 366 (7th Cir. 2004) ("the point of [the] 'multi-employer' gloss . . . is that since

the contractor is subject to OSHA's regulations of safety in construction by virtue of being engaged in the construction business, and has to comply with those regulations in order to protect his own workers at the site, it is sensible to think of him as assuming the same duty to the other workers at the site who might be injured or killed if he violated the regulations").

Relying on a statement in the multi-employer citation policy that it applies across "all industry sectors," Vicuna contends that the judge erred in construing the multi-employer doctrine to apply only to construction sites. The judge drew this conclusion, however, after Vicuna failed to provide her with cases applying the multi-employer citation policy outside the construction context. Even on appeal, Vicuna has not drawn our attention to any such cases. Teal v. E.I. du Pont de Nemours & Co., 728 F.2d 799 (6th Cir. 1984), on which Vicuna relies, did not concern the multi-employer citation policy. It was a diversity case applying Tennessee law, in which the defendant conceded that it owed a duty to comply with a specific OSHA regulation governing clearance of ladders and that it breached that duty. See id. at 805. The question before the Sixth Circuit was whether the trial judge erred by declining to instruct the jury on negligence per se, a doctrine recognized in Tennessee, but not in Massachusetts. See id. at 803; Juliano, 461 Mass. at 532.

Regardless, even if we assume that the multi-employer doctrine is not strictly limited to construction cases, the larger point is that the doctrine governs joint worksites -- i.e., those on which employees of one employer are working alongside employees of another -- a situation that arises most frequently in the construction context. See Acosta, 909 F.3d at 735; Universal Constr. Co., 182 F.3d at 730. The roof of Draper Properties' building was not a joint worksite. Draper Properties hired a single independent contractor, MV Construction, to handle the single job of removing the snow from the roof. Vicuna and the other MV Construction employees performed the job alone, and no employees of Draper Properties were working on the roof when Vicuna's accident occurred. The judge properly concluded that the multi-employer doctrine did not apply in these circumstances. See MYR Group, Inc., 361 F.3d at 366-367 (multi-employer doctrine inapplicable where no employees of defendant were on worksite).

Finally, Vicuna has failed to demonstrate that any error in excluding the OSHA materials was so prejudicial as to require a new trial. To establish prejudice, Vicuna must show that the error "injuriously affect[ed] [his] substantial rights." DeJesus v. Yogel, 404 Mass. 44, 47-48 (1989). An injury to substantial rights occurs "when relevant evidence is erroneously

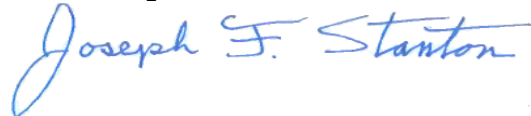
excluded that, viewing the record in a commonsense way, could have made a material difference." Id. at 48.

The danger of working on the roof was open and obvious. Vicuna, an experienced roofer, could see that the roof had no guardrails and no place to tie off protective equipment, but he chose to proceed with the work despite the obvious risk. Cf. Aulson v. Stone, 97 Mass. App. Ct. 702, 711 (2020) ("danger of working with power tools that include sharp blades was obvious," and "[u]sing the same without ensuring sufficient space for the safe operation of this equipment plainly heightened the risk of injury"). Given Vicuna's expertise as a roofer, the open and obvious nature of the risk of performing the job without protective equipment, and the jury's finding that Vicuna was seventy percent comparatively negligent, we are satisfied that the OSHA materials, which had marginal relevance at best, would have had no material effect on the trial. Cf. Almeida v. Pinto, 94 Mass. App. Ct. 540, 544 (2018) (homeowner did not breach duty of reasonable care by failing to provide decedent with safety equipment or by failing to ask whether he had equipment, "where

he offered to undertake specialized work that he claimed to have done before").<sup>2</sup>

Amended judgment affirmed.

By the Court (Wolohojian,  
Milkey & Shin, JJ.<sup>3</sup>),



Clerk


Entered: July 2, 2021.

---

<sup>2</sup> Draper Properties cross-appealed from the amended judgment, arguing, among other things, that the judge erred by declining to award costs. Draper Properties acknowledges that whether to award costs rests in the discretion of the judge, see Goulet v. Whitin Machine Works, Inc., 399 Mass. 547, 555 (1987), and it has not demonstrated any abuse of that discretion. Having affirmed the jury's verdict, we need not address the remaining issues that Draper Properties raises on cross appeal.

<sup>3</sup> The panelists are listed in order of seniority.

# Exhibit 10

<b>JUDGMENT AFTER RESCRIPT</b>		<b>Trial Court of Massachusetts The Superior Court</b>	
DOCKET NUMBER  1682CV01105		Walter F. Timilty, Clerk of Courts	
CASE NAME  Vicuna, Lucas vs. Draper Properties, Inc.		COURT NAME & ADDRESS Norfolk County Superior Court 650 High Street Dedham, MA 02026	

This action was appealed to the SJC or Appeals Court for the Commonwealth, the issues having been duly heard and the SJC or Appeals Court having duly issued a rescript,

It is **ORDERED** and **ADJUDGED**:

JUDGMENT/ORDER after Rescript: The original judgment (#61.0) is Affirmed.

DATE JUDGMENT ENTERED  08/02/2021	CLERK OF COURTS/ ASST. CLERK  X <i>Mary K. Wulfe</i>
---	--

# Exhibit 11



COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT

C.A. NO.

21

762

ARACELI ARGUELLO and LUCAS  
VICUNA, as Parents and  
Next Friends of their minor children,  
JUAN ERNESTO VICUNA REYES,  
and JOSHUA DANIEL VICUNA,  
Plaintiffs

v.

DRAPER PROPERTIES, INC.,  
Defendant

2021 AUG 17 PM 3:26  
CLERK OF THE COURT  
NORFOLK COUNTY

**LOSS OF PARENTAL CONSORTIUM COMPLAINT AND DEMAND  
FOR TRIAL BY JURY**

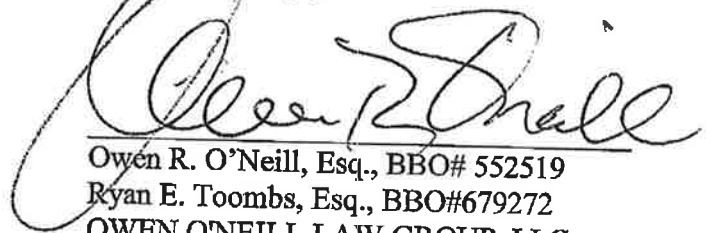
1. The plaintiff, Araceli Arguello, is an individual who currently resides at 4 Shawdowbrook Lane, Apt. #55, in Milford, Worcester County, MA. She is married to Lucas Vicuna.
2. The plaintiff, Lucas Vicuna, is an individual who resides at 177 West Street, in Milford, Worcester County, MA. He is married to Araceli Arguello.
3. The plaintiffs are the parents and next friends of two minor sons, Juan Ernesto Vicuna Reyes ("Juan") (currently age 15) and Joshua Daniel Vicuna ("Danny") (currently age 8), who reside at 177 West Street in Milford, Worcester County, MA, and 4 Shawdowbrook Lane, Apt. #55, in Milford, Worcester County, MA, respectively.
4. The defendant, Draper Properties, Inc. ("the defendant"), is a Massachusetts corporation having a principal place of business at 28 Draper Lane, Canton, Norfolk County, MA ("the subject premises").
5. On or about February 18, 2015, Lucas Vicuna was working at the subject premises as an employee of MV Construction, Inc. removing snow off of the roof when he fell to the ground below, sustaining serious and permanent injuries, including but not limited to, a traumatic brain injury and multiple fractures to his left arm.
6. On or about February 18, 2015, the defendant, as the owner and entity in control of the subject premises, owed Lucas Vicuna, a duty of reasonable care.

7. The defendant breached its duty of care to Lucas Vicuna by negligently causing or permitting the hazardous conditions to exist on the roof of the subject premises on or about February 18, 2015, and by negligently failing to provide Lucas Vicuna with a reasonably safe work area.
8. As a direct and proximate result of the negligence of the defendant, its agents, servants, or employees, Lucas Vicuna was caused to sustain severe and permanent physical injuries, suffered great pain of body and mind, required extensive hospital and medical care and treatment, lost time from work, and his ability to engage in normal and usual activities as the father of Juan and Danny was adversely affected.
9. In November of 2019, the personal injury case entitled Lucas Vicuna v. Draper Properties, Inc., Norfolk Superior Court, C.A. No. 1682CV01105 (hereinafter, "the underlying personal injury action") was tried before a jury in Norfolk County Superior Court. On or about November 26, 2019, the jury returned a verdict finding Lucas Vicuna seventy percent (70%) responsible for his construction site accident and the defendant, Draper Properties, Inc. thirty percent (30%) at fault for said accident.
10. After both parties filed timely appeals with the Massachusetts Appeals Court, the original judgment dated November 26, 2019 was affirmed on July 2, 2021. No further appeals were filed by either party, so final judgment entered in the underlying personal injury action on August 2, 2021.
11. As a direct result of the defendant's negligence, which has been established as a matter of law pursuant to the final judgment which entered in the underlying personal injury action on August 2, 2021, Lucas Vicuna suffered a severe traumatic brain injury and multiple fractures to his dominant left arm, requiring him to be hospitalized for many months, comatose for a lengthy period of time, and having to re-learn how to walk, talk, eat, and communicate. Lucas Vicuna underwent two invasive brain surgeries and four reconstructive surgeries on his injured left arm. Lucas Vicuna suffers from permanent cognitive and behavioral deficits as a result of his traumatic brain injury, and has limited use of his left arm.
12. Lucas Vicuna's injuries and the resulting physical, emotional, and behavioral side effects have permanently impaired his parental relationship with his two minor sons, Juan and Danny, and have resulted in his sons permanently losing much love, support, companionship, guidance, advice, and consortium of their father.
13. As a direct result of the defendant's negligence, which has been established as a matter of law pursuant to the final judgment which entered on August 2, 2021, Juan and Danny have suffered, and will continue to experience a substantial loss of parental consortium, as well as associated mental stress, anxiety and emotional trauma, for the rest of their lives.

WHEREFORE, the plaintiffs, Araceli Arguello and Lucas Vicuna, as Parents and Next Friends of their two minor sons, Juan Ernesto Vicuna Reyes and Joshua Daniel Vicuna, hereby demand judgment to be entered in their favor in such an amount to fully compensate their sons' damages, together with interest and costs.

**THE PLAINTIFFS DEMAND A TRIAL BY JURY ON THEIR TWO MINOR SONS' LOSS OF PARENTAL CONSORTIUM CLAIMS.**

The plaintiff,  
ARACELI ARGUELLO and  
LUCAS VICUNA, as Parents and  
Next Friends of Their Minor Children,  
JUAN ERNESTO VICUNA REYES,  
and JOSHUA DANIEL VICUNA,  
By their attorneys,



Owen R. O'Neill, Esq., BBO# 552519

Ryan E. Toombs, Esq., BBO#679272

OWEN O'NEILL LAW GROUP, LLC

600 Chapman Street, Suite 4

Canton, MA 02021

Tel: (339) 502-8900

[owen@oolawgroup.com](mailto:owen@oolawgroup.com)

[ryan@oolawgroup.com](mailto:ryan@oolawgroup.com)

Dated: August 17, 2021